No. 3588

United States Circuit Court of Appeals for the Ninth Circuit

In the Matter of the Petition of THE TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

THE TERRITORY OF HAWAII,

Appellant,

vs.

HUTCHINSON SUGAR PLANTATION COMPANY, LIMITED,

Appellee.

BRIEF

On Behalf of Appellant

UPON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

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CONTENTS

WORDS AND PHRASES

AHUPUAA

A large division of land generally running from mountain to sea.

BOUNDARY COMMISSIONER,

A commissioner established under the Act of 1862, whose duty it was to determine the boundaries of lands awarded by name only.

ILI,

A tract of land within an Ahupuaa. There were two kinds of Ilis: an Ili-aina which belonged to the Ahupuaa, and an Ili-kupono, which did not necessarily belong to the konohiki of the Ahupuaa.

KALAKAUA, DAVID,

Son of C. Kapaakea and Ane Keohokalole. Became King in 1874; Died 1891.

KEOHOKALOLE, ANE,

A High Chiefess. Wife of Caesar Kapaakea, and mother of David Kalakaua.

KONOHIKI,

1. An agent or representative of another.
2. A chief to whom had been awarded an Ahupuaa or other division of land.

KULEANA,

A small piece of land.

LAND COMMISSION AWARD,

A judgment of the Commission to Quiet Titles to Land under the Act of December 10, 1845.

LLELE,

A piece of land appurtenant to the Ahupuaa.

MAHELE,

A division. The Great Mahele refers to the division of land between Kamehameha III. and the Chiefs in 1848. There was also a Mahele between Kamehameha III. and the Government in 1850.

MAHELE AWARD,

An award issued by the Minister of the Interior under the Konohikis Act of 1860 to those whose names appeared in the Mahele Book of 1848, but who had failed to receive an award of the Land Commission.

ROYAL PATENT (upon confirmation of Land Commission award).

A Government grant.

ROYAL PATENT (Grant),

This was issued upon a sale or exchange of Government land.

Statement of the Case

On October 1st, 1913, the Territory of Hawaii filed in the Land Court of the Territory its petition No. 283, for registration of its title to a piece of land situate in the District of Kau, Island of Hawaii, known as the Ahupuaa of Kioloku, containing an area of 850 acres. (Rec. 15 to 21). A map of the land so sought to be registered is attached to the petition. (Rec. 297). Evidence was subsequently adduced placing the value of the land at $11,000. (Rec. 132.)

The Land Court of the Territory in which the petition was filed is a Court of Record established in the year 1903. The statutory provisions relating thereto being found in sections 3133 to 3242 inclusive of the Revised Laws of Hawaii of 1915, as amended by Acts 61, 62 and 152 of the Session Laws of 1915, and Act 48 of the Session Laws of 1919.

In its petition the Territory claimed the ownership of the land in question and the highways crossing the same in fee simple. The petition recites *inter alia* that the land has never been awarded, patented or granted to any person or persons, and is in the class of "unassigned lands," which are the property of the Government; that the Hutchinson Sugar Plantation Company, a corporation organized under the laws of the State of California, claims the ownership of

the land by mesne conveyance from David Kalakaua (afterwards King)), who claimed the land as an heir at law of Ane Keohokalole, his mother, deceased.

The procedure established by law for the reference of the title to an examiner and the entry of a general default against all persons not appearing, was complied with, and on December 5th, 1913, the Hutchinson Sugar Plantation Company filed its answer claiming title to the land in question and denying the Territory's claim. (Rec. 21, 22 and 23).

On October 22nd, 1918, the cause came on for hearing before Honorable J. T. DeBolt, Judge of the Land Court of the Territory of Hawaii, when evidence was adduced in support of the petition by the Territory (Rec. 75 to 92 and 183 to 243), and evidence was likewise adduced on behalf of the contestant. (Rec. 93 to 183).

In addition to the evidence offered, stipulations as to several facts were entered into between the petitioner and the contestant by their respective counsel, and approved and accepted by the Court. It was admitted by the petitioner that ever since 1870 Kalakaua and his assigns have been in open, notorious, exclusive and adverse possession of the land in question, using it for such purposes as it was adapted to, and paying taxes thereon; and that the Hutchinson Sugar Plantation Company succeeded to the rights of Kalakaua by several mesne conveyances, none of which, however, refer to any mahele, land commission

award or patent of the land in question (Rec 60, 61, 129.)

After the hearing of the case had been concluded, evidence of the petition of Kalakaua for a certificate of boundaries of the Auphuaa of Kioloku was discovered, and on motion the petitioner was allowed to introduce this evidence. (Rec. 23 to 28.) The motion was granted and the evidence referred to adduced. Whereupon counsel stipulated as to agreed facts in connection with the newly discovered evidence, which stipulation was approved by the Court. (Rec. 28 to 31.)

At the hearing in the Land Court the petitioner offered evidence in support of its claim that the land in question is "unassigned land." That is, that the Government had never conveyed or granted it to anyone and it therefore remained the property of the Territory.

Evidence was offered by the contestant in support of its claim that considering the long-continued possession of the contestant, and other facts and circumstances connected with the case, the Court should presume a grant even though such grant cannot now be found.

There are therefore two vital questions in the case, viz.:

I. HAS THE GOVERNMENT BY ANY AWARD, PATENT OR GRANT DISPOSED OF ITS TITLE TO THE LAND? AND

II. WILL THE COURT BY REASON OF THE LONG-CONTINUED POSSESSION OF THE CON-

TESTANT, AND THE OTHER FACTS AND CIRCUMSTANCES SHOWN IN THE CASE, PRESUME AN AWARD, GRANT OR PATENT?

The evidence being concluded and after oral argument and filing of briefs, the Court on January 29th, 1919, filed a decision finding that the petitioner has no right, title or interest whatsoever in and to the land in question, and therefore has no right to have its title registered, and decree was ordered dismissing the petition (Rec. 32 to 57.) The decree was accordingly entered. (Rec. 57 to 58.) Whereupon the case was taken on error to the Supreme Court of the Territory; (Rec. 1 to 14) the Supreme Court sustaining the Court below; (Rec. 244 to 263) and judgment was entered in the Supreme Court affirming the decree of the Land Court. To reverse this judgment the present appeal is taken.

SPECIFICATIONS OF ERRORS RELIED UPON

Attached to the petition for the allowance of appeal to this Court there is an assignment of errors, all of which are relied upon by the appellant in this case. These assignments are as follows:

> "First. The said Supreme Court of the Territory of Hawaii erred in rendering, entering and filing its decision affirming the decree of the Land Court of the Territory of Hawaii, which said decision of said Supreme Court of the Territory of Hawaii was filed

in said cause on the 15th day of March, 1920, and which said decree of the said Land Court was entered and filed on the 4th day of February, 1919.

Second. The said Supreme Court of the Territory of Hawaii erred in rendering and filing judgment affirming the decree of the Land Court of the Territory of Hawaii (242), which said judgment of said Supreme Court of the Territory of Hawaii was filed in said cause on the 18th day of March, 1920, and which said decree of said Land Court was entered and filed on the 4th day of February, 1919.

Third. The Supreme Court of the Territory of Hawaii erred in not reversing the decree of said Land Court of the Territory of Hawaii, which said decree was entered and filed in said Land Court on the 4th day of February, 1919.

Fourth. That the said Supreme Court of the Territory of Hawaii erred in not holding and in not entering judgment in said cause in favor of said appellant and against the Hutchinson Sugar Plantation Company, Limited.

Fifth. That said Supreme Court of the Territory of Hawaii erred in holding and deciding that the doctrine of the common-law presumption of a lost grant may be invoked in favor of the state as well as against it.

Sixth. The said Supreme Court of the Terri-

tory of Hawaii erred in holding and deciding as follows:

> 'No living witness has been produced who was present at the proceedings before the Boundary Commissioner, and while the statement of Kalakaua in his petition was weighty evidence supporting the claim that no award of Kioloku had been issued to his mother, yet the proceedings had upon the petition before the Commissioner strongly refute that assumption.'

Seventh. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

> 'Clear probative force must be attached to the facts that both the king and the Government, although being represented at the hearing before the Boundary Commissioner, neither interposed any objection thereto, and the hearing proceeded to final determination.' (243.)

Eighth. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

> 'The fact that Mr. Kanakanui's search has revealed the existence of no record of an award of Kioloku, taken together with the recitation contained in the petition of Kalakaua, constitutes the strongest circumstances in the case of the Territory. This evidence, weighty

as it may seem, appears to be overcome by other facts forming a combination of circumstances which irresistibly lead to the conclusion that Kioloku had been awarded to Ane Keohokalole, namely, the facts that she was exercising dominion over this property as early as 1861; that in the partition deed of 1870 this land was set apart to Kalakaua and in 1873 the boundaries were settled upon his application with the knowledge and acquiescence of the king and the government; that from 1870 down to 1913, a period of forty-three years, the several successive governments of Hawaii recognized Kioloku as the property of Kalakaua and his successors in interest; that during this entire period no claim whatsoever was asserted by the government or by any representative thereof to Kioloku, and during the whole period the property was assessed as the property of Kalakaua and his successors in interest, and taxes were collected by the government down to the date of the institution of this proceeding.'

Ninth. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

'The evidence introduced on behalf of the company we deem to be sufficient to sustain

the Judge of the Land Court in presuming that a grant of Kioloku was issued to Ane Keohokalole, the grant itself having been lost or for other reasons cannot now be produced.'

Tenth. The Supreme Court of the Territory of Hawaii erred in holding and deciding that in the case of Kahoomana vs. Minister of the Interior, 3 Haw. 635,

'It is plainly to be seen that the Court here was dealing with the law applicable to the statute of limitations and the common law presumption of a lost grant was not involved in the case.' " (244.)

ARGUMENT

From what has already been said, it will appear to the Court that the case at bar involves a study of the evolution of Hawaiian land tenures, as without such study many things appearing in the record must be incomprehensible. It seems desirable, therefore, before discussing the errors relied upon, to relate as briefly and succinctly as possible the principal events of Hawaiian history connected with the evolution and establishment of its land tenures.

In the "Overland Monthly" of June, 1895, there appeared an article written by the Honorable Sanford B. Dole, formerly Associate Justice of the Supreme Court of Hawaii, then President of the Republic of Hawaii, and since Governor of the Territory of Hawaii, and later Judge

of the United States District Court in and for the District and Territory of Hawaii. This article traces the evolution of Hawaiian land tenures from the earliest times to the establishment of the Commission to Quiet Titles to Land, known as the Land Commission, established by legislative enactment on December 10, 1845. As this article presents the matters far more succinctly and interestingly than the writer of this brief could attempt to do, it has been considered desirable to incorporate the same in this brief, the gracious consent of Judge Dole having been secured December 17, 1920.

EVOLUTION OF HAWAIIAN LAND TENURES

(By the President of the Hawaiian Republic.)

When the Hawaiian pilgrim fathers first landed on the lonely coast of Hawaii from their long and exhausting ocean voyage in their canoes decked with mats and rigged with mat sails, it was for them a new departure in government and social and industrial economy. Their past, with its myths of origin, its legends of struggle and wandering, its faiths and customs, and rites and ceremonies, its lessons of victory and defeat, it successes over nature, was still their present authority and paramount influence, as they feebly began a new social enterprise upon the desolate yet grand and beautiful shores of their new inheritance. Their past still held them through its venerable sanctions, and yet they were free in the freedom of a new and unoccupied

land to add to its accumulations and to improve upon its lessons.

We may imagine that the remnant of the freight of their storm-worn canoes included a few household idols, a live pig or two, some emaciated chickens, a surviving bread fruit plant, and kou and other seeds. There were women as well as men in the company; the little children had succumbed to the hardships of the voyage, which was undertaken to escape the indignities and confiscations incident to the status of a defeated party in tribal warfare.

These people, lean and half famished, gladly and with fresh courage took possession of their new world. As soon as they recovered their strength they built a heiau (temple) and sacrificed to their gods.

After a little exploration they settled in a deep valley sheltered by steep cliffs and watered by an abundant stream of clear water abounding in fish and shrimps. At the mouth of the gorge was the sea, where there were shellfish, crabs, and a variety of fish. Fruits of various kinds flourished on the hillsides, with some of which they were acquainted while others were new to them. They found varieties of the kapa (native cloth) plant, and understanding the process of making its bark into cloth, they restored their wardrobe, which had for the most part disappeared in the vicissitudes of the voyage. They also discovered the taro (arum eculentum) growing wild in mountain streams, which they hailed as an old friend, feeling

that now their satisfaction with their new home was complete. The cultivation of this was begun at once as a field or dry land crop, as had been the practice in the home land, but as time went on and some crops failed for want of rain, irrigation was used, until at length, it may have been generations after, the present method of cultivating the crop in permanent patches of standing water became established. This result was greatly favored by the abundance of running water which was a feature of the country.

Children were born and grew up and intermarried, and the colony grew and prospered. Exploring parties went out from time to time and other watered valleys were found, and bays and reefs rich in fishing resources. As the community began to crowd the limited area of the valley which was their resting place, one and another of these newly discovered and favored localities was settled, generally by a family consisting of the parents and grown up boys and girls. And now and then new companies of exiles from the southern islands found their weary way over the ocean, bring perhaps later customs and adding new gods to the Hawaiian pantheon. So Hawaii was gradually populated, and when its best localities were occupied, Maui began to be colonized, and then its adjacent islands, until the whole group was stocked with people.

There may have been a few chiefs in the pioneer company who largely directed the affairs of the colony, and whose descendants furnished chiefs for the growing de-

mands of the branch colonies. Among the new arrivals also were occasional chiefs that were hospitably welcomed and accredited as such and accorded corresponding position and influence. It is also probable that in the very early period when chiefs were scarce the head men of some of the settlements that had branched off from the parent colonly acquired the rank of chiefs, from the importance of their positions and the influence which their authority over the lands of their respective settlements naturally gave them. Such acquired rank descended to their children, in some cases doubtless with an increase of dignity due to marriages with women of chief rank; and so some new families of chiefs originating from the common people, or makaainanas, were established.

This early period of Hawaiian history for a number of generations was a time of industrial enterprise and peaceful and prosperous growth. There was no occasion for fighting, for there was land and water enough for all and everyone was busily employed. It was the golden age of Hawaii. There were taboos indeed, but only religious ones. No chief was powerful enough yet to proclaim taboos for political purposes, nor had the necessity for political taboos yet arisen. The arts prospered; the Hawaiian canoe developed; the manufacture of kapa flourished and made progress in the direction of variety of fabric and its esthetic decoration; royal garments of birds' feathers were manufactured; implements of stone and of wood for mechanical and industrial work were invented and improved

upon; and great engineering enterprises were undertaken, such as the irrigating systems of Wahiawa, Kapaa, and Kilauea, on the Island of Kauai, and great sea walls enclosing bays and reefs for fish ponds, such as the one at Huleia, on Kauai, and at many other places all over the Islands. The antiquity of some of these is so great that even tradition fails to account for their origin, as in the case of the parallel irrigating ditches at Kilauea on Kauai, the digging of which is attributed by the Hawaiians to the fabled moo, or dragon, and the deep-water fish-pond wall at the Huleia river on Kauai, which is supposed to have been built by the menehunes, the fabled race of dwarfs, distinguished for cunning, industry and mechanical and engineering skill and intelligence. In reality they were the pioneers of the Hawaiian race who took complete industrial and peaceful possession of the country, and this early period is distinctly of the period of menehunes or skillful workers.

Principles of land tenure developed slowly through this period, probably from some form of the patriarchal system into a system of tribal or communal ownership. There was land enough for everyone, and holdings at first were based upon possession and use. As in the irrigating customs of the Hawaiians, where there was an abundance of water, every taro grower used it freely, and at all times according to his own convenience, and there were no regulations, but in those localities where the water supply was lim-

ited, strict rules for its distribution grew up, so when the land was not occupied, there was freedom in its use, it being easier to locate new holdings than to quarrel about old ones. But as land irrigation developed, requiring permanent and costly improvements in the way of irrigating ditches and the building of terraces on the valley slopes for the foundation of taro patches, such improved localities acquired a special value, and the more real sense of ownership in land, which is based upon an investment of labor in the soil beyond the amount required for the cultivation of a crop, began. A quality of this ownership was necessarily permanent, because of the permanence of the improvements that created it.

Another element of tenure arose as the population increased and the best lands became occupied; the increasing demand gave them a market value, so to speak, which gave rise to disputes over boundaries. Although such feuds, sometimes attended with personal violence, favored the development of later feudalism of the Hawaiians, yet the early period, containing many of the features of tribal government and land tenure common to the Samoans, Fijians, and Maories of New Zealand, probably lasted a long time, with a gradual development of the principle of ownership in land and descent from parent to child subject to tribal control, until it was perhaps radically and violently interrupted by the turbulent times beginning in the thirteenth century, and lasting till the conquest of the group

by Kamehameha I. This was a period of internecine warware promoted by the ambition of chiefs for political power and personal aggrandizement, and was most favorable to the growth of feudalism, which rapidly took the place of the previous political status.

As was inevitable under the new conditions, the importance and influence of the chiefs was greatly increased, to the immediate prejudice of the rights and privileges of the people, who were oppressively taxed in support of the wars brought on by the whim of their respective rulers, or to defend them from the attacks of ambitious rivals. The growing necessity for protection of life and property caused everyone to attach himself closely to some chief, who afforded such protection in consideration of service and a portion of the produce of the soil. Then the chiefs, as their power increased, began to levy contributions of supplies arbitrarily, until it came to pass that the chief was the owner of the whole of the products of the soil, and the entire services of the people, and so it was a natural consequence that he became finally the owner also of the soil itself. These results, which were hastened by the constant wars of this period, were yet of slow growth. The small valley and district sovereignties one by one disappeared in the clutch of rising warrior chiefs, who thus added to their dominions and power. As such principalities became formidable, it became necessary for the remaining smaller chiefdoms to ally themselves to some one of

them. And so this process went on until each island was at length under the control of its high chief, and then finally the whole group passed under the sovereignty of Kamehameha I, and the feudal program was complete.

During this period the control of the land became very firmly established in the ruling chiefs, who reserved what portions they pleased for their own use, and divided the rest among the leading chiefs subject to them. The position of the latter was analogous to that of the barons of European feudalism. They furnished supplies to their sovereign, and in case of war were expected to take the field with what fghting men their estates could furnish. These barons held almost despotic sway over their special domains apportioning the land among their followers according to the whim of the moment or the demands of policy, or farming it out under their special agents, the konohikis, whose oppressive severity in dealing with the actual cultivators of the soil was notorious. Thus the occupancy of land had now become entirely subject to the will of the ruling chief, who not only had the power to give but also to take away at its royal pleasure. This despotic control over land developed in the direction of greater severity rather than toward any recognition of the subjects' rights, and it finally became an established custom for a chief who succeeded to the sovereign power, even peacefully by inheritance, to re-distribute the land of the realm.

It is evident that this status was, for the time being,

disastrous and destructive to all popular rights in land that may have previously existed. If there was formerly anything like succession in tenure from father to son and tribal ownership, such holdings were now utterly destroyed, and the cultivators of the soil were without rights of cultivation or even of habitation. "The country was full of people who were 'hemo,' that is, dispossessed of their lands at the caprice of a chief. Three words from a new to a former konohiki, 'Ua hemo oe' (you are removed) would dispossess a thousand unoffending people and send them houseless and homeless to find their makamakas (friends) in other valleys." (Alexander's reply to Bishop Stanley.)

The redistribution of lands upon the accession of a ruling chief was naturally carried out with great severity when his accession was the result of civil war between rival factions or the triumph of an invading army. In the case of a peaceful accession of a young chief to sovereign power, the redistribution was mainly to his personal friends and companions, and was less complete than in the case of a revolution of force. Very influential men of the previous reign would not be disturbed, both because it would be dangerous and impolitic to do so, and because their assistance was desired. A curious survival of this feudal custom of a re-distribution of power and land upon the accession of new ruler is recognizable in the equally reprehensible sentiment of modern politics, expressed in the well-known words, "to the victors belong the spoils."

When Kamehameha I. conquered the group, excepting the island of Kauai, which was accomplished only after the most desperate fighting, his success carried with it the fullest and severest application of this custom, and it meant to his defeated enemies loss of all political power and of the lands which were the basis of such power. The island of Kauai, through the treaty of annexation between the king of that island, Kaumualii, and Kamehameha, might have escaped such misfortunes but for the rebellion of Humehume, the son of Kaumualii, some years later, which, being suppressed, subjected the insurgent chiefs to the rigorous rule of confiscation of their lands and the annihilation of their political influence.

Thus Kamehameha became at last, through these feudal customs and by virtue of his conquest, the fountain head of land tenures for the whole group. The principles adopted by the Land Commission in 1847 opens with the following statement:

"When the Islands were conquered by Kamehameha I. he followed the examples of his predecessors and divided the lands among his principal warrior chiefs, retaining, however, a portion in his hands to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew, and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again, passing through the hands of four, five, or six persons, from the king down to

the lowest classes of tenants. All these persons were considered to have rights in the lands or productions of them. The proportions of these rights were not very clearly defined, but were, nevertheless, universally acknowledged."

During Kamehameha's long and vigorous reign, affairs became unsettled to an extent to which the country had been unaccustomed. Long and undisturbed possession of their lands by chiefs was a preparation for the development of a sentiment favorable to permanent individual rights in land. Such a sentiment had become well defined in the mind of Kamehameha before his death, and may be regarded as the seed germ of a system of land tenures which afterwards developed.

Many of those who have been interested in this subject have been accustomed to regard the idea of private rights in land in these islands as one of foreign introduction during the reign of Kamehameha III., at which time the remarkable change from feudal to private real estate control took place. But the landed reforms of that reign were the results of causes which had been long and powerfully at work. The century plant had slowly grown, but when its full time came it swiftly and abundantly blossomed.

At the meeting of chiefs at Honolulu upon the arrival of the frigate "Blonde" in 1852 with the remains of Kamehameha II. and his wife, to consider the question of the succession to the throne and other matters, as reported in the "Voyage of the Blonde," page 152 and following,

Kalaimoku, the agent, in his address to the council, referred to the inconveniences arising from the reversion of lands to the king on the death of their occupants, a custom partially revived under Kamehameha II., but which it had been the object of Kamehameha I. to exchange for that of hereditary succession. This project of their great king he proposed to adopt as the law, excepting in such cases as when a chief or landholder should infringe the laws, then land should be forfeited and himself tabooed. Several chiefs at once exclaimed, "All the laws of the great Kamehameha were good; let us have the same!"

Lord Byron, captain of the "Blonde," presented the council some written suggestions in regard to the administration of affairs which are contained in the following article:

"That the lands which are now held by the chiefs shall not be taken from them, but shall descend to their legitimate children, except in cases of rebellion, and then all their property shall be forfeited to the king."

The account proceeds as follows: (page 157):

"These hints, it will be at once perceived, are little more than a recommendation quietly to pursue the old habits and regulations of the Islands. Kamehameha I. had begun to establish the hereditary transmission of estates, and Lord Byron's notice only adds the sanction of the British name to it."

The principle adopted previously to the reign of Ka-

mehameha III. greatly influenced the progress of events.

When after the death of Kamehameha I. his son Liholiho, came to the throne as Kamehameha II., the administration of the government was shared by him with Kaahumanu, the kuhina nui (a premier or minister having a veto on the king's acts), one of Kamehameha's widows, and a woman of great force of character. It was the desire of Kamehameha II. to make a redistribution of the lands of the realm according to custom, but Kaahumanu was opposed to it, and her influence, together with the united strength of the landed interests which had become firmly established in the chiefs during the long reign of Kamehameha I., was too strong for him, and beyond a few assignments among his intimate friends, he relinquished his purpose. The distribution of lands, therefore, by Kamehameha I. remained for the most part as a permanent settlement of the landed interests of the kingdom, to be afterwards modified in favor of the common people of the government, but never ignored.

During the period from the distribution of lands by King Kamehameha I., about 1795, till the year 1839, the sovereign held a feudal authority over the whole landed estate of the kingdom, which included the right, as above set forth, summarily to cancel the rights in the lands of any chief or commoner. There was a growing tendency, however, during this period toward the provision in favor of the descent of lands from parent to child adopted by

the chiefs upon the return of the "Blonde," and the feudal right of the sovereign over the land of the subject was more rarely exercised as time went on. Increasing security in tenure led to increasing activity in land transactions. Chiefs transferred lands to others, and they became a marketable commodity; there was buying and selling, some speculating. The sovereign gave away and sold lands here and there. Foreigners became landholders. Still there was no permanence in the tenure, the enactment by the chiefs at the time of the "Blonde" being in the nature rather of an expression of an opinion than a binding law. The kingdom was then under the regency of Kaahumanu and Kalanimoku, and Kamehameha III., being still a minor, was not a party to this provision and it was not regarded as binding upon him.

The status of land matters at this time was similar to that which existed in England after the Norman conquest, but there the progress of events, owing undoubtedly to the influence of a foreign civilization, was far more rapid than here. The possession of land by foreigners with strong governments back of them, represented here by men-of-war and zealous consuls, had a stimulating effect upon this movement. It was a transition period; the strength of the feulal despotism was fast waning and there was as yet nothing of a positive nature to take its place. This uncertainty in regard to land was a serious obstacle to material progress. The large landholders, the chiefs and

some to whom they had given or sold their lands, felt a degree of security in their holdings through the growing sentiment toward permanent occupation and hereditary succession; but this was insufficient to place land matters upon a satisfactory footing and to justify extensive outlays in permanent improvements. Moreover, that class of occupiers of land known as tenants, which class included a large proportion of the common people, was still in a condition which had scarcely felt the favorable influences which had begun to improve the status of the chiefs. They were hardly recognized as having civil rights, although they enjoyed freedom of movement and were not attached to any particular lands as belongings of the soil. If a man wanted a piece of land to live on and cultivate, he had to to pay for it by a heavy rent in the shape of weekly labor for his landlord, with the additional liability of being called upon to assist in work of a public character, such as building a heiau (temple) or making a road or fish-pond seawall. With all this, the tenant was liable to be ejected from his holding without notice or a chance of redress. That this defenseless condition of the common people was rigorously taken advantage of by landholding chiefs and their konohikis, we have the evidence of those living in this period, including some of the early missionaries, that it was a feature of the times that large numbers of homeless natives were wandering about the country. This want of security in the profits of land cultivation led many to attach them-

selves to the persons of the chiefs as hangers-on, whereby they might at least be fed in return for the desultory services which they were called upon to perform. This practice of hanging-on, or following a chief for the sake of food, was a feature of the perfected feudalism, when insecurity of land tenure was at its height, and the word defining it, hoopilimeaai, probably originated at that period.

In 1833, Kamehameha III., then twenty years old, assumed the throne, and soon became deeply interested in public affairs. In many ways the unsatisfactory status of land matters was pressed upon his attention. The growing sentiment towards permanence in tenure powerfully influenced the situation. The defenseless and wretched condition of the common people in regard to their holdings appealed to his humanity and to his sense of responsibility as their ruler. The inconsistency of his sovereign control of all the lands of the kingdom with any progress based upon the incoming tide of civilization became more and more evident every day.

The increasing demand among foreigners for the right to buy and hold land was an element of importance at this national crisis and doubtless had much to do in hastening the course of events. The king not only consulted the great chiefs of the realm, who certainly were in favor of permanence of tenure for themselves, but he also conferred with foreigners on the subject. In 1836 Commodore Kennedy and Captain Hollins visited Honolulu in

the United States ships Peacock and Enterprise, and during their stay held conferences with the chiefs, in which the question of land tenure was discussed. In 1837, Captain Bruce of the British frigate Imogene had several meetings with the chiefs in regard to matters of government, when, in all probability, land matters were considered. The influence of Mr. Richards, for a long time the confidential adviser of the chiefs, was undoubtedly very great with the king in leading his mind to the definite conclusion that he reached in 1839, in which year, on the 7th day of June, he proclaimed a Bill of Rights which has made his name illustrious and the day on which it was announced worthy of being forever commemorated by the Hawaiian people. This document, though showing in its phrases the influence of the Anglo-Saxon principles of liberty, of Robert Burns and the American Declaration of Independence, is especially interesting and impressive as the Hawaiian Magna Charta, not wrung from an unwilling sovereign by force of arms, but the free surrender of despotic power by a wise and generous ruler, impressed and influenced by the logic of events, by the needs of his people, and by the principles of the new civilization that was dawning on his land.

The following is a translation of this enlightened and munificent royal grant:

"God hath made of one blood all nations of men to dwell on the earth in unity and blessedness. God hath also bestowed certain rights alike on all men and on all chiefs, and all people of all lands

"These are some of the rights which He has given alike to every man and every chief of correct deportment: life, limb, liberty, freedom from oppression, the earnings of his hands and the productions of his mind, not, however, to those who act in violation of the laws.

"God has already established government and rule for the purpose of peace; but in making laws for the nation, it is by no means proper to enact laws for the protection of the rulers only, without also providing protection for their subjects; neither is it proper to enact laws to enrich the chiefs only, without regard to enriching their subjects also, and hereafter there shall by no means be any laws enacted which are at variance with what is above expressed, neither shall any tax be assessed, nor any service or labor required of any man in a manner which is at variance with the above sentiments.

The above sentiments are hereby proclaimed for the purpose of protecting alike both the people and the chiefs of all these islands while they maintain a correct deportment; that no chief may be able to oppress any subject; but that chiefs and people be able to enjoy the same protection under one and the same law.

"Protection is hereby secured to the persons of all people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom and nothing whatever shall be taken from any individual except by express provision of the laws. What-

ever chief shall act perseveringly in violation of this declaration shall no longer remain a chief of the Hawaiian Islands, and the same shall be true of the governors, officers, and all land agents. But if anyone who is disposed should change his course and regulate his conduct by law, it shall then be in the power of the chiefs to reinstate him in the place he occupied previous to his being deposed."

It will be seen that this Bill of Rights left much to be done in defining the rights in land granted by it. It appears by the constitution enacted by the king, the kuhina nui, or premier, and the chiefs the following year, that the fuedal right of controlling transfers was still retained in the sovereign, in the following words:

"Kamehameha I. was the founder of the kingdom, and to him belonged all the land from one end of the islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I. was the head and had the management of the landed property. Wherefore there was not formerly, and is not now, any person who could or can convey away the smallest portion of land without the consent of the one who had, or has, the direction of the kingdom."

The Bill of Rights promoted activity in land matters, and for the next few years difficulties arising from land disputes pressed upon the king, producing great confusion and even endangering the autonomy of the kingdom. In 1841, Ladd & Company, the pioneers in sugar cultivation in this

country, obtained from the king a franchise that gave them the privilege of leasing any unoccupied lands for one hundred years at a low rental. This franchise was afterwards transferred to a Belgian colonization company of which Ladd & Company were partners, under circumstances that made a good deal of trouble for the Hawaiian government before the matter finally disappeared from Hawaiian politics. The intimidation of the king by Lord Paulet, captain of the British frigate Carysfort, under which the provisional cession of the country to England was made in 1843, was based largely upon a land claim of Mr. Charlton, an Englishman, which was regarded by the king as illegal, but which he finally endorsed under Paulet's threat of bombarding Honolulu. These troubles naturally developed among the Hawaiians an opposition to the policy of allowing foreigners to acquire land which, in 1845, reached the definite stage of political agitation and petitions to the government.

During these years of undefined rights, the common people were protected in their holdings by law to a certain extent, but their tenure was based mainly upon their industrious cultivation of their lands, except as to house lots, and the payment of rent in labor. The question of the proportionate interests of the king, the chiefs, and the common people, in the lands of the kingdom was one of great difficulty. As we have seen the Constitution of 1840 distinctly recognized such a community of interest, but Hawaiian

precedents threw no light upon the problem of division. It had been a new departure to admit that the people had any inherent right to the soil, and now to carry out that principle required the adoption of methods entirely foreign to the traditions of Hawaiian feudalism.

In this transition time the necessity of an organized government separate from the person of the king became apparent to the chiefs, and this was carried out by three comprehensive acts in 1845, 1846, and 1847. The first, "to organize the executive ministry of the Hawaiian Islands"; the second, "to organize the Executive Departments of the Hawaiian Islands"; and third, "to organize the Judiciary Department of the Hawaiian Islands." As soon as the existence of a responsible government detached from the person of the king became an accepted feature of the political system, it was felt that in some way or other the government ought to have public lands and become the source of land titles. At this inception the government as a distinct organization was possessed of no landed property; it may be said to have had a right to that portion of the king's interest in the landed property of the kingdom which he held in his official capacity, in distinction from that which belonged to him in his private capacity; but this was a mere theoretic right, dimly recognized at first, and and only after innumerable difficulties and fruitless expedients was it finally developed and carried out in the great mahele, or division of lands between the king, the chiefs,

and people, in 1848. Elaborate laws were made for the purchase of land by the government from private landholders, which do not appear to have added materially to the public domain.

The act to organize the Executive Department contained a statute establishing a Board of Royal Commissioners to Quiet Land Titles. This statute was passed December 10th, 1845. It was a tentative scheme to solve the land problem, and though not in itself sufficiently comprehensive for the situation, it was in the right direction, and led, through the announcement of principles of land tenure by the commission, which were adopted by the Legislature, to a better understanding of the subject, and finally, in the latter part of 1887 (1847?) to the enactment by the king and privy council of rules for the division of the lands of the kingdom, which, with the statute creating the Land Commission and the principles adopted by them, formed a complete and adequate provision for the adjustment of all recognized interests in land on the basis of the new departure of the principles of tenure.

At the time of the creation of the Board of Commissioners to Quiet Land Titles and up to the enactment of rules by the privy council for land division, the nation was still feeling its way through the maze of the difficult questions that were pressing upon it in this great reform in land matters. Each step it made threw light upon the path for the next one. The rapidity with which this reform

was accomplished must be attributed not only to the wisdom and fidelity of the advisers of the nation, but largely to the earnestness and patriotism of the king and chiefs, who cheerfully made sacrifices for the sake of a satisfactory solution of these questions.

The Commissioners to Quiet Land Titles were authorized to consider claims to land from private individuals, acquired previous to the passage of the act creating the commission. This included natives who were in the occupancy of holdings under the conditions of use or payment of rent in labor, and also both natvies and foreigners who had received land from the king or chiefs in the way of grants. The awards of the Board were binding upon the government if not appealed from, and entitled the claimant to a lease or a royal patent, according to the terms of the award, the royal patent being based upon the payment of a commutation of one quarter or one third of the unimproved value of the land, which commutation was understood to purchase the interest of the government in the soil.

The principles adopted by the Land Commission use the words king and government interchangeably, and failed to reach any adjudication of the separate rights of the king in distinction from those of the government in the public domain, or in other words they failed to define the king's public or official interests in distinction from his private rights, although they fully recognized the distinc-

tion. There was, however, an implied apportionment of these two interests through the proceedings by which an occupying claimant obtained an allodial title. The commission decided that their authority coming from the king to award lands represented only his private interests in the lands claimed. Therefore, as the further payment of the claimant as a condition of his receiving a title in fee simple from the government was one third of the original value of the land, it follows that the king's private interest was an undivided two thirds, leaving an undivided one-third belonging to the government as such.

The commission also decided that there were but three classes of vested or original rights in land, which were in the king or government, the chiefs and the people, and these three classes of interest were about equal in extent.

The Land Commission began to work February 11th, 1846, and made great progress in adjudicating claims of the common people, but its powers were not adequate to dispose of the still unsettled questions between the king, the chiefs, and the government, though it must be admitted that it made progress in that direction. Neither were the chiefs ready to submit their claims to its decision.

After earnest efforts between the king and chiefs to reach a settlement of these questions, the rules already referred to were unanimously adopted by the king and chiefs in Privy Council, December 18th, 1847. These rules, which were drawn up by Judge Lee, embodied the following

points: The king should retain his private lands as his individual property, to descend to his heirs and successors; the remainder of the landed property to be divided equally between the government, the chief, and the common people.

So the land was all held at this time by the king, the chiefs, and their tenants, this division involved the surrender by the chiefs of a third of their lands to the government, or a payment in lieu thereof in money, as had already been required of the tenants landholders. A committee of which Doctor Judd was chairman was appointed to carry out the division authorized by the Privy Council, and the work was completed in forty days. The division between the king and the chiefs was effected through partition deeds signed by both parties; the chiefs then went before the Land Commission and received awards for the lands thus partitioned off to them, and afterwards many of them commuted for the remaining one third interest of the government by a surrender of a portion.

After the division between the king and the chiefs was finished, he again divided the lands that had been surrendered to him between himself and the government, the former being known thereafter as crown lands and the latter as government lands.

This division with the remaining work of the Land Commission completed the great land reform, the first signal of which was announced by Kamehameha III. in his

Declaration of Rights, June 7, 1839. A brief ten years had been sufficient for the Hawaiian nation to break down the hoary traditions and venerable customs of the past, and to climb the difficult path, from a selfish feudalism to equal rights, from royal control of all the public domain to present proprietorship and fee simple titles for the poor and for rich. It came quickly and without bloodshed because the nation was ready for it. Foreign intercourse, hostile and friendly, and the spirit of a Christian civilization had an educating influence upon the eager nation united by the genius of Kamehameha I., with its brave and intelligent warrior chiefs resting from the conquest of arms, their exuberant energies free for the conquest of new ideas. With rare wisdom, judgment, and patriotism, they proved equal to the demands of the time upon them.

SANFORD B. DOLE.

FURTHER OF THE LAND COMMISSION:

On December 10, 1845, a law was enacted providing for the appointment of a commission to quiet land titles "for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this act; the awards of which board, unless appealed from as hereinafter allowed, shall be binding upon the Minister of the Interior and upon the applicant."

The act, which is reprinted in the Revised Laws of Hawaii of 1905, pages 1160, et seq., provides that the commission, during the continuance of its sessions, should advertise in the "Polynesian" newspaper, a notice of its sittings, including the following:

> "All persons are required to file with the board specifications of their claims to land, and to adduce the evidence upon which they claim title to any land in the Hawaiian Islands, before the expiration of two years from this date, or in default of so doing, they will after that time be forever barred of all right to recover the same, in the courts of justice."

Section 8 of the act provides as follows:

> "All claims to land, as against the Hawaiian government, which are not presented to said board within the time, at the place and in the manner prescribed in the notice required to be given in the fifth section of this article SHALL BE DEEMED TO BE INVALID, AND SHALL BE FOREVER BARRED IN LAW, unless the claimant be absent from this kingdom, and have no representative therein."

Section 6 of this act provided that the board shall exist for the quieting of land titles during two years from the first publication of the notice above referred to.

The commission was duly appointed and published its first notice on February 14, 1846.

On August 20, 1846, the commission adopted certain principles for their adjudication of claims presented to them, which principles were ratified and confirmed by the nobles and representatives in Legislative Council, on October 26, 1846. They provide *inter alia* as follows:

> "It being therefore fully established that there are but three classes of persons having vested rights in the land,—1st, the government, 2nd, the landlord, and 3rd, the tenant, it next becomes necessary to ascertain the proportional rights of each. . . . it is altogether probable that since the act of 1839 a few individuals may have acquired allodial ownership of landed property, either by purchase or by voluntary grant on the part of the king. Such ownership must be proved or it cannot be acknowledged; for the king, representing the government, having formerly been the sole owner of the soil, he must be considered to be so still, unless proof be rendered to the contrary; and even possession of ever so long standing cannot be proof of anything more than that which is specified above as belonging to the landlord, or to the landlord and tenant, as the case may be."

The seventh paragraph of the principles provides as follows:

> "The titles of all lands, whether rightfully or wrongfully claimed, either by natives or foreigners,

in the entire kingdom, which shall not have been presented to this board for adjudication, confirmation or rejection, on or before the 14th day of February, 1848, ARE DECLARED TO BELONG TO THIS GOVERNMENT, by section 8th of the article creating this board. Parties who thus neglect to present their claims, do so in defiance of the law and cannot complain of the effect of their own disobedience."

The "principles" further provided that

"The patents and leases are recorded in duplicate, in the Department of the Interior. This will enable the foundation of everyone's right to be known to the Government, and inquiring parties. No pretended ownerships can exist without the means of undeceiving the public in regard to them. Subsequent purchasers and mortgagees need not be in ignorance of prior defects in the title, or of prior incumbrances."

By an act of November 7, 1846, it was provided that

"If any konohiki wish to have his portion of any given ili or ahupuaa set off to him according to his rights in the same, that he may procure an allodial title therefor, he may petition the Minister of the Interior, on stamped paper, who shall have power, with the approbation of His Majesty in Privy Council, to complete the arrangements for the

same, after which there shall be given to the konohiki a patent for the same in accordance with Act 2, part 1, chapter 7, article 2."

As a part of the great system of quieting the title of lands of the islands, in 1848 there was a Great Mahele or division between the king and the chiefs. This mahele did not create or establish title; a subsequent award by the Land Commission or by the Minister of the Interior being necessary (Kenoa v. Meek, 6 Haw. 63;; Kanaiana v. Long, 3 Haw. 332). The mahele gave the right to the chiefs to present their claims to the lands named to the Land Commission and obtain an award therefor. Thereupon, the chiefs, upon the payment to the Government of certain fees or the relinquishment to the government of a portion of their lands, were entitled to receive a royal patent covering the land awarded.

By an act of the Legislature of June 7, 1848, certain large divisions of land were set apart to be the private lands of His Majesty Kamehameha III.; others were set apart to the Hawaiian government, and others were set apart for the use of the fort in Honolulu. Kioloku is not named in any of the lands enumerated in these lists.

By the act of June 13, 1848, the powers of the Board of Commissioners were extended for such a period of time from the 14th day of February, 1849, as shall be necessary for the full and faithful examination, settlement, and award upon all such claims as may have been presented to said board.

By an act approved May 26, 1853, it was provided that all claimants of land who have entered their claims with the Board and who shall not have appeared before the Board and proved their claims previous to the first day of May, 1854, shall be forever barred from proving the same.

By an act approved July 20, 1854, it was provided that the Board of Commissioners should be dissolved on the last day of March, 1855. By this act it was provided that

> "All awards for land claims which may be remaining in the hands of the said Board or its agents, together with all the books and papers belonging to the said board, at the time of its dissolution shall be delivered into the hands of the Minister of the Interior for safe keeping, by a detailed inventory particularly describing the books and marking all important documents by numbers, of which inventory there shall be two identical copies, one of which shall remain with the Supreme Court, and the other with the Minister of the Interior, whose duty it shall be to deliver the remaining awards to the parties interested, on payment of the costs."

By an act approved August 24, 1860, known as the "Konohiki's Act," it was provided that the Minister of the Interior is authorized to grant awards for their lands to all konohikis who have failed to receive the same from the Land Commission, provided that the names of such konohikis appear in the Mahele Book of the Year 1848, and all

awards so granted by said minister shall be equally valid with those of the Land Commission.

These statutory provisions relating to the lands of the Islands have frequently received the attention of the Supreme Court of Hawaii. To a few of these cases we wish to call the court's special attention.

Thurston v. Bishop, 7 Haw. 421.

This was an action in ejectment brought by the Minister of the Interior against the Trustees of the Estate of B. P. Bishop, deceased. It was tried before the Honorable Sanford B. Dole, jury waived. It related to a piece of land in Honolulu known as "Opu." It appeared from the admission of the parties that no claim to the land had been presented to the Commission to Quiet Land Titles within the time limited by statute for filing such claims, and the land had not been awarded by the Commission to anyone, nor had a Royal Patent been issued to anyone for it. The land was in the possession of defendants who held whatever interest was in Lot Kamehameha at the time of his death. Lot Kamehameha received the land by oral bequest in 1840 from a high chief who was then in possession of the land. It was held that

> "By force and effect of the statute creating the Land Commission (Section 8, Acts of 1846, p. 109), the claim which defendants' predecessor had to this land was barred in law by reason of its non-presentation to the Commission, and they have no title

to it; the land not being held by defendants by some title proceeding from the government, it is still the property of the government. The Declaration of rights in the Constitution of 1840, securing to the people their lands, is not violated by the bar in the statute above referred to, for at the time of the Declaration of Rights the people had no titles to land, and the statute provided a method by which titles could be obtained."

And it was further held that

"The defendants not showing any title or right of possession to this land, their possession as against the government can never ripen into a title."

Kahoomana v. Minister of the Interior, 3 Haw. 635.

This was an action in ejectment for the possession of the premises upon which the government buildings are now situated, commonly called Mililani. The plaintiff claimed title through Manuia and his wife Kaupena, who had occupied the land in 1829. Neither Kaupena nor her successors in interest had received an award of the Land Commission for the land, and the court held that

"The Land Commission, however, did not award it, and by the force and effect of the statutes above quoted it must be considered to still belong to the government.

Kenoa v. Meek, 6 Haw. 63.

This was an action in ejectment brought to recover possession of a piece of land known as "One half of Kalena, Waianae." Kenoa's ancestor Pahoa received from Kamehameha III. a mahele of this land in February, 1848, but failed to present his claim for the land to the Land Commission. The court held that

> "In my view, as Pahoa neglected to perfect his title before the Board of Land Commission but suffered his claim to be barred, the legal title remained in the government and the Royal Patent to A. Bishop conveyed their title to him, and it was prior to the patent issued to Pahoa it must prevail."

See also:

Kaelekolani v. Robinson, 2 Haw. 522;

The Estate of Kamehameha IV., 2 Haw. 715;

Harris v. Carter, 6 Haw. 195;

Atcherley v. Lewers and Cooke, 18 Haw. 625;

In re Pa Pelekane, 21 Haw. 175;

Kapiolani Estate v. Atcherly, 21 Haw. 441;

From the foregoing the following propositions are clear:

FIRST: ORIGINALLY ALL LANDS WERE THE PROPERTY OF THE GOVERNMENT.

SECOND: THE GOVERNMENT COULD BE DIVESTED OF TITLE BY THE FOLLOWING METHODS:

(A) BY AN AWARD OF THE LAND COMMISSION, BASED UPON THE MAHELE OF 1848.

(B) BY AN AWARD OF THE LAND COMMISSION BASED UPON PRIOR GIFT BY THE KING.

(C) BY AN AWARD OF THE MINISTER OF THE INTERIOR BASED UPON THE MAHELE OF 1848,

(D) BY ROYAL PATENT (GRANT) BASED UPON A SALE OR EXCHANGE.

(E) BY ROYAL PATENT (GRANT) BASED UPON THE MAHELE.

THIRD: ANY LAND NOT CONVEYED BY ONE OF THE FOREGOING METHODS FALLS INTO THE CLASS OF "UNASSIGNED LANDS," AND REMAIN THE PROPERTY OF THE GOVERNMENT.

ERRORS RELIED UPON.

Assignments Nos. 8 and 9. These assignments are as follows:

Eighth. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

"The fact that Mr. Kanakanui's search has revealed the existence of no record of an award of Kioloku taken together with the recitation contained in the petition of Kalakaua constitutes the strongest circumstances in the case of the Territory. This evidence, weighty as it may seem, appears to be overcome by other facts forming a

combination of circumstances which irresistibly lead to the conclusion that Kioloku had been awarded to Ane Keohokalole, namely, the facts that she was exercising dominion over this property as early as 1861, that in the partition deed of 1870, this land was set apart to Kalakaua and in 1873 the boundaries were settled upon his application with the knowledge and acquiescence of the king and the government; that from 1870 down to 1913, a period of forty-three years, the several successive governments of Hawaii recognized Kioloku as the property of Kalakaua and his successors in interest; that during this entire period no claim whatsoever was asserted by the government or by any representative thereof to Kioloku, and during the whole period the property was assessed as the property of Kalakaua and his successors in interest and taxes were collected by the government down to the date of the institution of this proceeding."

Ninth. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

"The evidence introduced on behalf of the company we deem to be sufficient to sustain the Judge of the Land Court in presuming that a grant of Kioloku was issued to Ane Keohokalole, the grant itself having been lost or for other reasons cannot now be produced."

It is the contention of the petitioner that no award, grant or patent of Kioloku was ever issued by the government.

In support of this contention the petitioner relies upon the following:

First: The law required that copies of every award, grant or patent should be preserved, and an examination of those copies fails to show the existence of any award, grant or patent affecting the land in question.

To prove the contention of the government that Kioloku is "unassigned land," Mr. S. M. Kanakanui was called as a witness. He testified that he is a surveyor by profession; that he is employed in the Land Office as a title searcher, having held that position for over a year, prior to which time he was in the Government Survey Department for nearly thirty years. He had had occasion during his professional employment to investigate the title of Kioloku. (Rec. 78.) The following questions were propounded to him and answers received:

Q. Have you found any land commission award, any royal patent or any grant of the land of Kioloku to anyone?

A. In my search I failed to find the--any award of any land contained in the Mahele of 1848, neither in the award of the land commissioners, nor in the grants issued by the government, nor in the -- in any other disposition made by the government of the land of Kioloku in Kau.

Q. And your search has been exhaustive on those matters.

A. Yes, sir.

Q. How exhaustive has been your search of these records, Mr. Kanakanui?

A. Oh, as far as my time and my ability serves.

Q. Beginning with the Mahele Book, have you examined the book of Mahele?

A. I did.

Q. Is there is in the Mahele Book any division mentioning the land of Kioloku?

A. There is not.

Q. Referring to Caesar Kapaakea, the father of Kalakaua is there any mahele of land in the Mahele Book relating to his land?

A. Yes, sir, there are.

Q. In the Mahele Book is there any mention under the head of Caesar Kapaakea of the land of Kioloku?

A. There is no mention.

Q. It is neither set apart to Kapaakea nor set apart for the king?

A. Yes, sir, it is not.

THE COURT: Q. Not, you say?

A. Not.

MR. LIGHTFOOT: Q. Referring now to the Mahele Book under the name of Ane Keohokalole, wife of Caesar Kapaakea, is there in the Mahele Book any mahele of the land of Ane Keohokalole?

A. There is a mahele.

Q. There is a mahele?

A. Yes; land of Keohokalole, but the Kioloku land, now under consideration is not contained in the mahele, either to Keohokalole herself or to Kamehameha III.

Q. And no mention is made—

A. And no mention is made.

Q. —of Kioloku in that mahele?

A. No.

Q. Referring to the records of the Privy Council, have you examined those records with reference to the land of Kioloku?

A. I have examined them, yes sir.

Q. And they are all now indexed, are they not?

A. Yes, sir.

Q. In the archives. Have you examined the indexes?

A. I did not.

Q. COURT: But you have examined the records, you say?

A. I have, the records in the Privy Council.

THE COURT: Q. As I understand, you have examined the records themselves?

A. Yes, sir.

MR. LIGHTFOOT: Q. Did you find in the record of the Privy Council any reference to the land of Kioloku?

A. I didn't find any mention of the land of Kioloku in the record. I have looked into the Privy Council.

Q. Have you examined the books of the Land Commission Awards of the Land Commission?

A. I have.

Q. Do the indexes of these books—they are indexed, are they not?

Q. Have you examined the indexes of those books?

A. Yes.

A. Yes, sir.

Q. Q. Is there in those books any award of the ahupuaa of Kioloku?

A. Award of the Ahupuaa of Kioloku?

Q. Yes.

A. There is none. There is none on the books of the Land Commission,

Q. You seem to lay stress upon the word "Ahupuaa" there. Is there any award of the land of Kioloku irrespective of whether it is an ili aina or an ahupuaa or lele or any other award of Kioloku?

A. There are a few awards. There are a few small awards to natives.

Q. That is, kuleanas within the—

A. Within the ahupuaas of Kioloku.

Q. But no award of the whole land?

A. Eh?

Q. But no award of the land as described in this petition?

A. No award. No award of the ahupuaa itself.

Q. The only awards being of the kuleanas within the ahupuaa?

A. Yes.

Q. And those awards that you have found in the Land Commission Award books have not described the land claimed in the present petition?

A. Those small awards? They are within the bounds of the land of the petition.

Q. Coming down to the Royal Patents, have you examined the records of all royal patents granted?

A. I have.

Q. Have you found any records of any royal patents either to Kapaakea, to Annie Keohokalole, or anyone else of the Ahupuaa of Kioloku?

A. In my examination of the patents to Kapaakea and Keohokalole I found that the land of Kioloku did not, was not included in any of those patents.

Q. In any of the royal patents?

A. And not in any other patent.

Q. And not in any other patent?

A. Yes.

Q. Or patent grant, royal patent,

A. Or patent grant, yes.

Q. Or land grant?

A. Patent grant and land grant is the same.

Q. Have you examined any other books of the government; that is, other than those heretofore enumerated, showing grants of land by the government to private individuals or corporations?

A. I have examined the record of the deeds, of the government deeds to private parties and I found that the land of Kioloku was not included in any of those deeds.

Q. Is there any record in any grant in the records of school lands of Kioloku?

A. School lands?

Q. Yes; it is not in the list of school lands?

A. Not in the list of school lands.

Q. Or of Crown lands?

A. Or the what?

Q. Or the Crown lands?

A. Neither in the school lands nor in the Crown lands.

(Record, 79 to 83 inclusive.)

The petition in this case was filed on August 1, 1913, and it was not until December, 1918, that the cause came on for hearing in the Land Court. In the meantime there had been a report of the "Examiner of Titles," an officer of the Land Court, adverse to the contestant. At all times the records of the government had been open to examination by the contestant, and there had been ample time to make a thorough search for any award, grant or patent.

The burden of proving a negative, to-wit, that no grant had ever been made, conveying this land was, in the first place, on the petitioner. Having presented a *prima facie* case, it became the duty of the contestant to overcome this case, especially in view of the fact that the public records

are open to the contestant as well as the petitioner, and in view of the further fact that if any grant had actually been made, the evidence of such grant would naturally be rather with the contestant than with the petitioner.

"It is a general rule of evidence, noticed by the elementary writers upon that subject, 1 Greenl. Ev., p. 79, 'that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.' When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative." *United States v. Denver etc. R. Co.,* 191 U.S., 84-92, 48 Law. Ed., 106.

See also:

Arthur v. Unkart, 96 U. S. 122, 24, L. Ed. 768;

Toleman v. Portbury, L. R. 5, Q. B. 288;

Colorado Coal, etc., Co. v. United States, 123 U. S. 307-317, 31 Law. Ed. 182;

U. S. v. American Bell Telephone Company, 126 U.S. 224-242, 42 Law. Ed. 144.

SECOND: THE ABSENCE OF AN AWARD, PATENT OR GRANT OF KIOLOKU IS PROVEN FROM THE FACT THAT THERE IS NO MAHELE OF THE SAME TO ANE KEOHOKALOLE.

It has been seen that there are two methods by which Ane Keohokalole could have acquired title, the first being by award of the Land Commission, and the second by patent of the Minister of the Interior on the recommendation of the King in Privy Council. In the Mahele Book of 1848 there is contained the Mahele between Ane Keohokalole and the king. The lands maheled to the chief or chiefess are contained on one page of the book and on the opposite page are written those maheled to the king. Petitioner's Exhibit "F" (Record 315, 316, 317 and 318) is a list of the lands maheled to the king under the heading of "Ko Kamehameha III" (for Kamehameha III), and also the lands maheled to Keohokalole under the heading "Ko Keohokalole," the former list being signed by Keohokalole and the latter by Kamehameha III, on January 28, 1848. There are thirty-nine lands maheled to the king and thirty-nine lands maheled to Keohokalole. There are seven lands maheled to the king situated in the District of Kau, Island of Hawaii (the same District as Kioloku) and nine lands maheled to Keohokalole in the same district; but Kioloku

is not included in either Keohokalole's mahele or that of the king.

Without a mahele of the land to the chief there could be no award by the Land Commission, and it is not surprising, therefore, that a search among the awards of the Land Commission did not reveal any award to Keohokalole of the Land Commission, and the absence of such a mahele constitutes absolute proof that there was no award of the Land Commission and it must be remembered that it was the award of the Land Commission which created the title.

THIRD: THE ABSENCE OF REFERENCE TO KIOLOKU IN THE RECORDS OF THE PRIVY COUNCIL SHOWS THAT THERE WAS NO GRANT OF KIOLOKU BY THE MINISTER OF THE INTERIOR ON THE AUTHORIZATION OF THE KING IN PRIVY COUNCIL.

It has been pointed out that the King in Privy Council might authorize the Minister of the Interior in certain cases to issue patents to the chiefs, which patents are described as Royal Patent Grants. Without the authorization of the King in Privy Council the Minister of the Interior was without authority to issue a Royal Patent Grant of Kioloku to Keohokalole and the absence of any mention of Kioloku in the records of the Privy Council is positive proof that no Royal Patent Grant was issued by the Minister of the Interior.

FOURTH: THERE IS NO MAHELE AWARD OF KIOLOKU

It has been seen that the Land Commission was established under the law of December 10, 1845, and commenced its operations on the 14th of February, 1846. It was to remain in existence for two years, but the Hawaiians, who seldom distinguished themselves for alacrity, had in many cases failed to present their claims to the Land Commission within the two years originally provided, and from time to time laws were enacted continuing the existence of the Land Commission until finally it went out of existence on the last day of March, 1855.

Although the Land Commission had been in existence, therefore, for some nine years, there were still several chiefs who had failed to present their claims to the Land Commission, and under the law, they were barred from any right to the land. To relieve the destitution of such chiefs who had been negligent, a law was enacted in 1860 called the "Konohikis Act" for the Relief of Certain Konohikis whose Names Appear in the Division of Lands from Kamehameha III, which law recited that

> "Whereas certain konohikis who were entitled to lands under the Division of 1848 have for various reasons failed to obtain their awards from the Land Commission within the time specified by law, and for that reason are destitute. . . "

Under this act the Minister of the Interior could grant an award (known as a Mahele Award) to those chiefs whose lands were maheled to them in 1848, but who had failed to receive an award of the Land Commission. Without the Mahele, therefore, there could be no Mahele Award. Neverthless an examination of the patents issued by the Minister of the Interior fails to disclose any award of Kioloku to anyone, affording thereby, an additional reason for believing that there could have been no mahele of Kioloku to Ane Keohokalole, and therefore no mahele award.

The Konohikis Act provides that

> "The Minister or his deputy shall cause a notice to be published continuously either in the native newspaper or in the "Polynesian," calling upon all konohikis, their heirs, executors, or administrators, to present their claims on or before the last day of June, 1862, and if such persons shall fail to present their claims within said specified time, he shall be forever barred, and his right, under the Mahele Book, shall revert to the government."
> (Revised Laws of Hawaii, of 1905, page 1192.)

Again, on December 16, 1892, a law was enacted authorizing the Minister of the Interior to issue Royal Patents (Grants) for certain lands named in the Mahele of 1848 which may have reverted to the government under

the Act of August 24, 1860 (the Konohikis Act), and not disposed of by the government in the meantime. This act provided (Section 4) that

> "This act shall remain in force until January 1, 1895, and any person having claims under this act who shall fail to present the same before said date shall be forever barred, and his rights under this act shall revert to the government."

But again no steps were taken by the heirs or assigns of Kalakaua to settle the title of Kioloku under the act in question.

In 1892 the lands of Kioloku had become tremendously valuable, and it is certain that if there ever had been a mahele to Ana Keohokalole including Kioloku, the successors of Kalakaua would have taken advantage of the last named act and completed their title; but this was never done, and no mahele award was issued under the last named act.

FIFTH: IN THE VARIOUS ATTEMPTED TRANSFERS OF KIOLOKU BEGINNNG WITH THE PARTITION DEED EXECUTED BY THE HEIRS OF ANE KEOHOKALOLE, AND IN WHICH THERE WAS AN ATTEMPT TO CONVEY TITLE TO KIOLOKU TO KALAKAUA, NO MENTION IS EVER MADE OF ANY MAHELE, LAND COMMISSION AWARD, OR ROYAL PATENT ISSUED ON AN AWARD OR ROYAL PATENT.

These conveyances are as follows:

The partition deed (Record 343 to 348 inclusive).

Deed of Kalakaua and wife, Kapiolani, to Obadiah Spencer, dated December 15, 1873, recorded in the Registry Office, Oahu, in Liber 38, page 438.

Deed of Obadiah Spencer to A. Hutchinson, dated May 12, 1874, recorded in Liber 39, page 323.

Deed, Executors of A. Hutchinson to Claus Spreckels and W. G. Irwin, trading together under the firm name of W. G. Irwin & Company, dated February 28, 1881, and recorded in Book 70, page 2.

Release of dower of Margaret A. Hutchinson, widow of A. Hutchinson, to Claus Spreckels, dated April 30, 1880.

Deed of Claus Spreckels and W. G. Irwin to Hutchinson Plantation Company, dated November 28, 1884, recorded in Liber 93, page 16.

Deed of Hutchinson Sugar Plantation Company to Louis Sloss, dated June 1, 1890, recorded in Liber 119, page 120; and

Deed of Louis Sloss to the Hutchinson Sugar Plantation Company, dated June 11, 1889, recorded in Liber 118, page 376. (Record 179 to 183.)

It will be seen that it was admitted by appellee that in all of these transactions, the land is simply mentioned by name with no derivative title.

Of course, it is not necessary to the validity of a deed that the derivation of title should be shown. Nevertheless,

we respectfully submit that a careful conveyancer drafting a deed affecting such a valuable piece of land as Kioloku would insert the number of the Land Commission Award and the number of the Royal Patent or Royal Patent Grant if any such existed, and the fact that no reference is made to the origin of the title would seem to furnish strong proof that it had no origin, or in other words, the title remained in the government.

SIXTH: THE FACT THAT NO MENTION IS MADE OF KIOLOKU IN THE DEED OF TRUST OF K. KAPAAKEA AND A. KEOHOKALOLE TO C. R. BISHOP, DATED JUNE 14, 1860, IS SOME EVIDENCE THAT ANE KEOHOKALOLE DID NOT HAVE TITLE TO THE LAND.

It may be noted here that no claim is made by the contestant to title originating in Kapaakea, the father of Kalakaua, and husband of Ane Keohokalole (Record 176), the claim being that the title originated with Ane Keohokalole, mother of Kalakaua.

It seems that in 1860 Kapaakea and Keohokalole were in financial difficulties and they made an assignment of all their property, real and personal, with the exception of their personal wardrobe, to C. R. Bishop, for the benefit of creditors (Record 337 to 342). This deed of trust makes no mention of Kioloku, and although it is equally true that it makes no mention of any other land either by name or particular description, yet the fact that Kioloku is not men-

tioned, it being a valuable Ahupuaa of land containing 835 acres, is some evidence that Keohokalole did not have title to the land.

SEVENTH: THE DECLARATION OF KALAKAUA AS TO THE LACK OF TITLE OF KIOLOKU CONTAINED IN HIS PETITION TO THE COMMISSIONER OF BOUNDARIES, JUNE 23, 1873.

Ane Keohokalole died April 6, 1867 (Record 169). The estate was administered upon and a partition deed executed between the heirs in 1870. Three years afterward, Kalakaua presented a petition to the Commissioner of Boundaries for the settlement of the boundaries of certain lands, including Kioloku. In his petition to the Commissioner of Boundaries he says:

"The undersigned states that A. Keohokalole had lands. She did not receive awards from the Land Commission to some of her lands, but she still holds said Ahupuaas to this time. Therefore, herewith apply to settle the boundaries of said lands according to the names hereinunder, thus:" (Naming seven lands including the land of Kioloku, District of Kau, Island of Hawaii.)

Here is a distinct and definite statement on the part of the son of Ane Keohokalole that she did not have title to the land. This was a statement against his own interests made only six years after his mother's death, and doubtless made after energetic and fruitless search for the origin of this title.

We respectfully submit that the person most familiar with the title or lack of title in Kioloku was Kalakaua, and that when he makes the solemn admission that his mother had no title, that admission is entitled to the greatest weight.

THE PRESUMPTION OF A GRANT

It was admitted in oral argument by the contestant in the court below, that no statute of limitations runs against the Government, or as the maxim puts it,

"Nullum tempus occurrit regi,"

and it is therefore unnecessary to cite authorities in support of that doctrine.

"But," says the contestant, "although time does not run against the government, yet, if we express our claim in different language, and say that from the lapse of time and other circumstances, a lost grant will be presumed, we obtain a different result; for by the use of this expression time *will* run against the government, as if no doctrine existed to the contrary." So the contestant attempts to take the case out of the rule above referred to by stating that lapse of time *with other circumstances* will warrant the court in presuming a grant.

It was admitted by the Territory that the contestant had been in actual, open, notorious, adverse and exclusive use and occupation of the land in question since the partition deed between Kalakaua and his brother and sisters,

dated July 1, 1870, and that the lands have been used for the purposes for which they were suitable, to wit, the cultivation of cane and pasturage by the contestant and its predecessors in title since the last mentioned date. It was also admitted that the contestant and its predecessors in title have paid all taxes on the land. (Rec. 76-129.)

The "other circumstances" relied upon by the contestant are as follows:

(a) *The accounts of C. R. Bishop filed in Probate Record No.* 1839, *showing the receipt of rent from one Martin for the land of Kioloku from* 1861 *to* 1868 *inclusive.*

On June 14, 1860, Caesar Kapaakea and Ane Keohokalole conveyed all their real and personal property to C. R. Bishop as trustee, and in the accounts of Mr. Bishop, filed in the matter of the Estates of Kapaakea and Keohokalole, it appears that he had collected rent for the land of Kioloku (Rec. 171-175). There is nothing to show what land of Kioloku is meant. There is nothing in the accounts to indicate that Kioloku was on the Island of Hawaii. The Kioloku referred to may have been some other land, even on a different island. It is a well known fact that there are many places having the same name; for instance, there is a Waimea on Kauai, one on Oahu, one on Hawaii and probably one on Maui. But letting it be granted that the Kioloku referred to in the accounts is the Kioloku of this case, it will first be noticed that $20 a year, the amount

of rent collected is but a small rent, even for those days, of a piece of land of about 850 acres, now valued at $11,000. (Rec. 132.)

We have been able to find no inventory of the estate of Ane Keohokalole filed in the Probate Court, nor is there any reference from the beginning to the end of the record to this land, other than that contained in the Bishop account, and the references to the partition deed.

Again, the mere fact that one Martin paid rent for Kioloku does not warrant the presumption that either Kapaakea or Keohokalole claimed to own the land in fee. Ane Keohokalole may have received from the king and chiefs permission to use the land, and under this permission, may have rented the whole or part of the land to Martin. In fact many theories might be adopted to account for this payment of rent other than the theory that Ane Keohokalole has received a grant of the land. The petition of Kalakaua to the Boundary Commissioner, made shortly after the partition deed had been executed, in which the land of Kioloku is referred to as being held by Ane Keohokalole, but in which the definite statement is made that there had been no award of the land is far more eloquent on the question of a grant than is the account of Mr. C. R. Bishop, and we submit that the receipt of rent from Mr. Martin forms no basis for the presumption that a grant had issued, either to Kapaakea or Keohokalole.

(b) *The payment of taxes.*

The Territory admitted that the contestant and its predecessors in title had paid taxes on the property (Rec. 77). It is true that the payment of taxes is a factor which may be relied upon under a claim of adverse possession, but the payment of taxes alone does not constitute proof of adverse possession, nor does it, in this case, become proof that a grant had issued to Ane Keohokalole. Kalakaua knew that no grant had been issued. In other words, he knew that he had absolutely no title to the land. Having no title, he proceeded to fortify himself as best he could, and his successors followed suit. They knew that they had no title; they also knew that unless they paid the taxes on the land, it would very quickly be brought to the attention of the government that the land was producing no income to the government, and action would be taken to oust them. In the exercise of ordinary prudence, therefore, they would be ready and willing to include the land of Kioloku in their assessment, expecting thereby to fortify their position.

It must be remembered that during these years, the government received no rent for the land, and no consideration had at any time been paid therefor. The contestant and its predecessors in title would have no right to complain because they had used the land without consideration other than the payment of taxes.

We respectfully submit that there is no foundation for

the presumption of a grant, raised by the fact of payment of taxes.

(c) *The description of the boundary of L. C. A.* 9659, *intimating that Kioloku is konohiki land.*

There was admitted in evidence, L. C. A. 9659 to Kekahuna, dated April 8, 1852 (Rec. 96-98). The purpose of this offer was thus explained by counsel for the contestant:

> Mr. Robertson: "I am going to show, your Honor, the location of this land with reference to the land in dispute, and I am going to call your Honor's attention to the diagram in the award "konohiki," "konohiki," "konohiki," in other words, the diagram of the survey in the award shows this kuleana surrounded by konohiki land and not government land." (Rec. 97.)

At the date of this award the Land Commission was in session and it remained in session for nearly three years thereafter, to be exact, until March 31, 1855, when it was dissolved by law (vide supra). Now, as pointed out in the first part of this brief, prior to the awards of the Land Commission, all lands were the property of the king, and therefore anyone having charge of unawarded lands, had such charge under the king as his agent or *konohiki.*

Andrews thus defines the word "konohiki":

"The head man of an ahupuaa. A person who has

charge of a land, with others under him." (Andrews' Dictionary, page 294.)

Mr. Wright, a witness for the contestant, testified as follows on cross-examination:

By MR. LIGHTFOOT: Q. In your examination of Hawaiian surveys, Mr. Wright, you have stated on your direct examination that you have found the word "konohiki" to represent private ownership?

A. I did.

Q. Have you ever, in your examination of old surveys, found the word "konohiki" used as a boundary where the boundary was not on privately owned lands?

A. I have.

Q. On one occasion or on many occasions?

A. On many occasions.

Q. And referring both to crown lands and to government lands?

A. Yes, sir.

THE COURT: Q. That is, if a kuleana was situated within any crown lands or government lands, its boundaries would be designated as "konohiki"?

A. There are cases.

Q. There are cases?

A. There are cases.

MR. LIGHTFOOT: Q. Are you familiar with the Ahupuaa of Waiohinu?

A. I am.

Q. What is that?

A. Crown land.

Q. Crown land. Do you know if there are any surveys made of kuleanas within Waiohinu which give their boundaries on the Ahupuaa of Waiohinu as "konohiki"?

A. I do.

Q. Are there?

A. There are.

(Rec. 160-161.)

Mr. J. S. Emerson, a witness for the contestant, testified on cross-examination that the land in ancient times, in the way it was held by a person as the agent of another, was said to be konohiki land. (Rec. 142.)

"The land in ancient times, in the way it was held by a person as the agent of another, was said to be konohiki land." (Rec. 142.)

He also testified as follows:

Q. Yes. In a broad sense it may be said that all lands belonged to the king?

A. Yes.

Q. Really to the kings and chiefs—

A. Yes.

Q. —according to the constitution of 1840. Now the king didn't personally administer the individual lands?

A. Not at all.

Q. He had other people to care for them, did he not?

A. Yes.

Q. I am speaking of the time now before the Great Mahele.

A. Yes.

Q. What were those people called?

A. Konohiki.

Q. Konohiki; so that, before the Great Mahele, the custodian under the king of an ahupuaa was called a konohiki? (Rec. 142-143.)

A. Yes.

Mr. S. M. Kanakanui testified that there are many instances where the word "konohiki" is used as the boundary of a kuleana situate within government or crown lands. (Rec. 223.)

Mr. Walter E. Wall, Surveyor of the Territory, testified as follows:

Q. Now will you state what value is to be placed on the use of the word "konohiki" as a boundary as to a survey made in 1852?

A. The term "konohiki" might be applied in perhaps more than one way. In general, from a knowledge, a general knowledge of the use to which it has been put, I would be disposed to think that it was a convenient term used by surveyors, who were indifferent to an extent as to the actual ownership but realizing that it belonged to other parties—

Q. Other parties?

A. To other parties, and not knowing the owner in reality they would refer to it as "konohiki." For instance,

the konohiki of a land is the agent, the head of the ahupuaa, the agent in charge of the land. And a surveyor, it is enough for him to know that it was along someone else's land and in kuleanas, in particular, that was a very common reference, is found describing kuleanas and the various classes of land, crown land, lands of the chiefs and the lands of the government.

Q. Land of the government, you refer to?

A. I say it is very commonly used. It was a convenient term to apply as of belonging to someone other than the owner of the land being decsribed.

Q. I didn't quite understand you. You mean he would use the term konohiki if the surrounding land belongs to the government the same as he would if it belonged to a private individual?

A. It is frequently used. It was used, for instance— Now let me see , if the term konohiki was used in a survey prior to the date of the division or Mahele, that might properly apply to a konohiki land or to the konohiki, the agent in charge of it.

Q. That would be prior to 1852, though, wouldn't it?

A. Now, then, if a surveyor—

Q. Referring to the time prior to 1852, you say?

A. Prior to 1848.

Q. Yes.

A. Prior to 1848. Now if a surveyor refers subsequently to that it depends on his knowledge as to the own-

ership. If he was a painstaking man who had full knowledge of the ownership, did it knowingly, why the konohiki would refer to the occupier or possessor of the land at the time.

Q. And would it mean private ownership?

A. Well, it might be a crown land or it might be one of the konohiki lands. By konohiki land I would mean a land that was in the possession of a high chief and continued in his possession until title was warranted.

(Rec. 194-195-196.)

And again Mr. Wall testified as follows:

MR. LIGHTFOOT: Q. And what was the custom as to the boundaries of those lands in those ancient surveys?

A. Well, my understanding of the matter is that, prior to the Mahele, the larger ahupuaas were very strictly konohiki lands. They were held by the higher chiefs under the king, who really owned or controlled all lands. The chiefs under him were the agents on the konohiki property, and under the descriptions—those smaller lands refer to them as abutting along konohiki. That's the way the term came to be applied.

The surveyor who used the term "konohiki" in the surveying of this kuleana, was not describing Kioloku; he was describing a kuleana within Kioloku; he was probably ignorant of the title of Kioloku. But, however this may be, title to the land cannot be established by a surveyor. In the case of *Rose v. Yoshimura,* 11 Haw. 31, the court said:

"Counsel for defendants concedes that were it not for the fact that defendants' survey is the earlier judgment should be entered therein for plaintiff on the strength of his prior award and patent, but contends that upon the completion of defendants' survey the title of the land in question vested in those under whom the defendants claim, and that therefore the award subsequently made to plaintiff's awardee is void and of no effect, so far as it purports to grant the land.

"The American decisions cited by defendants' counsel in support of this contention are based, some on treaties and the others on special statutes bearing on the subject, and consequently furnish no assistance in a determination of the present case. We have no such treaties or statutes.

"As I understand the history of land titles in this country, no such effect, as claimed, can be given to the mere survey of a piece of land. Our Supreme Court has held that neither the Mahele itself (6 Haw. 67) nor an application for an award (3 Haw. 635) gave any title, and that until an award was made by the Board of Land Commissioners, or by the Minister of the Interior (after 1860), the land must be considered to still belong to the government.

"In the 'Principles Adopted by the Board of

Commissioners,' etc., the only reference to surveys is the following: '7th. Connected with each claim for land is its configuration and superficial contents, without the ascertainment and demarkation of which it were impossible to make an award, or to quiet the title as between neighboring proprietors. The Board is therefore under the necessity of causing each piece of land to be surveyed, at the claimant's expense, before awarding it. This is clearly contemplated by the 12th section of the law, among the expenses incidental to the proposed investigation.'

"As I read this section, there was no intention on the part of either the commissioners or the legislature that the survey, without an award, should be binding either upon the government or the claimant; on the contrary, I think it clearly appears that the Board was to have the power to continue its investigation upon any claim even after the survey was complete, and thereafter to make its award as it saw fit. Nor is anything to the contrary to be found in said 'Principles' or in any other law or decision of ours."

We respectfully submit that the description and survey of Kuleana 9659 forms no basis for the presumption of a grant to Ane Keohokalole or to anyone else.

(d) *Boundary descriptions contained in R. P. Grant*

2656 *to Kaunumanu, and R. P. Grant* 2748 *to Kaleiku. Also those of the Ahupuaa of Honoapo and the Ahupuaa of Waiohinu.*

Among the "other circumstances" relied upon by the contestant to support the claim that a grant should be presumed, there was offered in evidence Royal Patent Grant 2656 to Kaunamanu (Rec. 98, 99, 100). In this grant the description reads, "Commencing at the north corner on the seashore and running *along the boundary of Kioloku* North 76° . . ." There was also offered in evidence by the contestant Royal Patent 2748 to Kaleikau (Rec. 100 to 102). A part of the description of this land reads, "Thence along government land North 29¾ E. 13.0 chains to a stone wall on the *boundary of Kioloku.*" There was also offered by contestant and received in evidence Certificate of Boundaries issued by the Boundary Commissioner on the Ahupuaa of Honuapo, being numbered 74. The sixteenth course in the description of boundaries reads, "South 40¼° E. 34.7 chains *along Kioloku* to + cut in the bedrock, of stream at Kamaili"; and the twenty-third course reads, "South 70½° East 45.57 chains *along Kioloku* to pile of stones (Rec. 107-108). There was also offered in evidence Boundary Certificate of Waiohinu, also an adjoining land, the thirty-fourth course of which reads, "Along Kaunamanu government land to a point from which the *West corner of Kioloku* land the letter "A" cut in bedrock at the

junction of two streams bears North 40 degrees East 11 chains, thence" (Rec. 110).

It was admitted in oral argument and in the briefs in the court below, that any one of these "other circumstances" taken alone does not afford a basis for the presumption of a grant the contention being made, however, that all these "other circumstances" being taken together constitute that basis.

We respectfully submit that the value of the boundaries above referred to as bases of the presumption is nothing, and the sum of several nothings is nothing. If land titles are to be presumed on the theory that the sum of several nothings amounts to something, the trial of titles would degenerate into a mere farce.

(e) *The proceedings before R. A. Lyman, Boundary Commissioner.*

Assignment No. 6.

Sixth: The said Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

"No living witness has been produced who was present at the proceedings before the Boundary Commissioner, and while the statement of Kalakaua in his petition was weighty evidence supporting the claim that no award of Kioloku had been issued to his mother, yet the proceedings had upon the petition before the Commissioner strongly refute that assumption."

It will be remembered that the Land Commission in the early part of its existence issued awards only after a survey describing the land awarded by metes and bounds. It was soon found, however, that it was a physical impossability to procure surveys of all the lands awarded on account of the shortness of time and the absence of competent surveyors. Accordingly, on June 19, 1852, a law was passed empowering the board "to grant titles to konohikis for whole ahupuaas or ilis of land received by them from the king in the Division of 1848, awarding said lands by their proper names without survey." Many lands were thus awarded, but before a Royal Patent could issue on the awarded lands it was necessary to procure from the Commissioners of Boundaries appointed on the various islands, a certificate of the boundaries of the lands sought to be patented. The law creating the Commissioners of Boundaries was passed in August, 1862. Section 3 of this Act provides that

> "All owners of ahupuaas and ilis of land within this kingdom whose lands have not been awarded by the Land Commissioners, patented or conveyed by deed from the king, by boundaries described in such award, patent or deed, are hereby required within four years from the passage of this act, to file with the commissioners of the district in which the land is situate, an application to have the boundaries of said land decided and certified to by

the commissioners. The application shall state the name of the land, the names of the adjoining lands, and the names of the owners of the same, where known, and it shall also contain a general description, by survey or otherwise, of the boundaries as claimed."

Section 4 of the Act provides that

"It shall be the duty of the Commissioners . . . to notify the owner or owners of the lands and also those of the lands adjoining of the time when they shall be prepared to hear their case."

To support the claim of the presumption of a grant, the contestant offered the following evidence relating to the proceeding before the Boundary Commissioner:

MR. ROBERTSON: Q. State whether you brought with you under subpoena, the record of the boundary commissioner for the Island of Hawaii?

A. Yes, sir.

Q. Volume A, No. 1?

A. Yes, sir.

Q. Will you please refer to page 399 of that volume?

A. Yes, sir, I have it .

Q. State whether or not on that page there is any record with reference to a proceeding to settle the boundaries of the Ahupuaa of Kioloku in the District of Kau.

A. Yes, sir, there is.

Q. Written in the English language, is it not,

A. Yes, sir.

MR. ROBERTSON: We offer this in evidence.

MR. LIGHTFOOT: We submit that, for the reason formerly urged, it is immaterial to this case what the boundaries of Kioloku are. They are admitted to be correctly described in the petition, and therefore any evidence of that would be cumulative. The boundary commissioners were not entitled, not authorized to settle it.

THE COURT: The Government was a party to these proceedings?

MR. ROBERTSON: We propose to show that the Government was represented at the proceeding, yes, your Honor.

MR. LIGHTFOOT: I wish to state that the Government was not a party. The Government was not a party to these proceedings. It is true there was a Government—the record shows there was a Government representative of some kind present at the hearing before Judge Lyman, who was commissioner, but the Government was not represented.

(Argument.)

THE COURT: I will admit the document. I want everything before me that can possibly have any bearing upon the matter.

MR. ROBERTSON: Have you any objection to my reading this?

MR. LIGHTFOOT: No.

MR. ROBERTSON: Reads as follows: at the head of the page, "The Ahupuaa of Kioloku, District of Kau, Island of Hawaii, Third J. C.," which we claim means Judicial Circuit, "On this, the 14th day of October, A.D. 1873, the Commission of Boundaries for the Island of Hawaii, Third J.C., met at Waiohinu, Kau, on the application of D. Kalakaua, for the hearing of testimony for the boundaries of Kioloku, situated in the District of Kau, in said Island of Hawaii."

THE COURT: Why, that was to fix the boundaries of the land in question, then?

MR. ROBERTSON: Yes, your honor. You see I am not reading now— This proceeding here was in October, 1873; this was subsequent to the partition deed of the heirs of Keohokalole whereby Kalakaua was assigned, in the partition between the family, to this land of Kioloku. He then, in 1873, brought this proceeding for the settlement of the boundaries. It was a land that was awarded, like so many others were, by name, and that is what the boundary commissioners were established by law for, was to settle the boundaries of lands that had been awarded by name only, and in that proceeding, according to the regular procedure, notice of the proceeding was given to adjoining owners, and they were entitled to be heard, not on the question of the title but upon the boundaries of the land. Now then, we will show that the boundaries on the west side, the boundary, the land on the west side of Kioloku

was a Government land, hence the Government was directly interested in the settlement of the boundaries of Kioloku because it was an adjoining land, and that fully accounts for the Government being represented at the proceeding.

(Continues reading): "Due notice personally served on owners or agents of adjoining lands as far as known. President J. G. Hoapili for the applicant and his Majesty, W. T. Martin for the Hawaiian government." Then follows the testimony of witnesses which I will not take time to read unless counsel wants it. There was a continuance until the 15th continuance on account of the illness of a witness, until the 15th of October, 1873, and then the—I will read again: "Boundary Commission met at Poohina on October 15th, at the house of the witness Pae, according to adjournment from the 14th inst. Present J. G. Hoapili and J. Kauhane." At the end of the testimony there was this entry: "Testimony closed. Decision, boundaries to be as given in evidence of the witnesses of this land and Honuapo, and Royal Patents of adjoining lands. Survey ordered. Notes of survey to be filed previous to certificate of boundaries being issued. R. A. Lyman, Commissioner of Boundaries, Third J. C."

We offer that in evidence.

MR. LIGHTFOOT: Wouldn't it be well to stipulate that in the evidence there is no record of any testimony beinp given as to the ownership of the title of Kioloku? It is ambiguous as it is there.

MR. ROBERTSON: I will admit that. That proceeding is not a trial of title; it is a settlement of boundaries. I will admit that no reference was made, with this qualification, Mr. Lightfoot, that Kalakaua was claiming—

MR. LIGHTFOOT: Yes, yes.

(Testimony of Henry Peters.)

MR. ROBERTSON: With that understanding that the proceeding was instituted by Kalakaua, claiming to be the owner, there is no other reference to the title of the land, the title not being at issue in that proceeding.

Kalakaua, as it has been seen, presented his petition for a certificate of title of the boundaries of Kioloku and likewise the boundaries of several other lands stating, however, in his petition that although his mother, Ane Keohokalole, had held the lands, she had not received an award for them. When the petition of Kalakaua was discovered by the government a motion was made to reopen the case so that the same might be admitted. The motion was granted (Rec. 23 to 28), and thereupon a stipulation as to agreed facts was entered into by counsel for the respective parties (Rec. 29 to 31). In the stipulation it was agreed that no hearing had been had before the Boundary Commissioners on any of the lands named in the petition of Kalakaua other than Kioloku.

The first land, Lililoa, Puna, Hawaii, was sold by the government in 1896 to John T. Baker, being Grant No. 3954. A portion of the second land, Nalua, Kau, Hawaii,

was sold by the government by grant 2118. The remainder was homesteaded by the government in 1913. The third land, Kamakamaka, Kau, Hawaii, is unknown, there being no map or survey by which it can be identified. A portion of the fourth land, Kapaukau, Kau, Hawaii, containing 205½ acres, was sold by the government by Grant 2653. Other portions were homesteaded in 1913. The fifth land, Mohakea, Kau, Hawaii, was the property of Princess Ruth. The sixth land, Ilikahi, Kau, Hawaii, was sold by the government in several parcels to various parties in 1852 and 1853 by grants numbered 866, 927, 1145, 1174, and 1175. It was also admitted that no Land Commission Award covered any of the lands could be found in the records of the Land Commission or other public records. (Rec. 29 to 31).

The fact that one "Martin" was present before the Boundary Commissioner, also, it seems to us, has no weight. Who was Martin? Was he the gentleman paying rent for Kioloku? That is the only mention of any Martin in the case. There is nothing to show what office Martin held, or that he had power to bind the government by his presence before the Boundary Commissioner. Kalakaua doubtless thought that, owing to the absence of title, he would get a certificate of boundaries, which might be made the substitute for a Royal Patent in some subsequent proceedings, and to lend extra solemnity to the occasion, he might have secured the presence of Mr. Martin, represent-

ing the government, who, for aught we may know to the contrary, may have been poundmaster. There was no power in Mr. Martin to bind the government, and the fact of his presence before the Commissioner of Boundaries cannot be made the basis of any presumption of a grant.

The Boundary Commissioner was not a court of record. His duties were to determine boundaries. He had nothing whatever to do with the title. The proceedings before the Boundary Commissioner were similar to those before the District Magistrate under the Landlord and Tenant Act.

In re Boundaries of Paunau, 24 Haw. 546. The records of the Boundary Commissioner do not import absolute verity and there is no proof that the Hawaiian government was given notice of the petition of Kalakaua, or took any part in the proceedings. The Commission of Boundaries was required to give notice to the owners of adjoining lands. He was not required to give notice to the government that the petition of Kalakaua had been filed, and that he claimed to own the ahupuaa. Indeed, for aught that appears to the contrary, the officers of the government, whose business it was to attend to the public lands were blissfully ignorant of the whole proposition.

Land titles in Hawaii do not depend upon such slender threads. There were certain methods laid down by law for acquiring government lands. These methods were exclusive and cannot be added to at the present day. We can see

nothing in the proceedings had before the Boundary Commissioner, especially after reading the decision in the Paunau case, which affords any basis for the presumption that a grant of Kioloku was issued to Ane Keohokalole.

(f) *The letter of Professor Alexander to the Minister of the Interior containing a list of unassigned lands in which is not included the Ahupuaa of Kioloku.*

As an "additional circumstance" of contestant's theory of the presumption of a grant, there was offered and received in evidence a letter written by W. D. Alexander, then Surveyor-General of the Kingdom, to the Minister of the Interior, dated June 15, 1888, containing a list of unassigned lands, in which the Ahupuaa of Kioloku is not included (Rec. 319 to 333). If Professor Alexander were able to speak from the grave, he would undoubtedly admit that at no time during his long life did he know all about every land in the Hawaiian Islands. His knowledge of the unassigned lands of Hawaii was doubtless acquired by degrees. When he wrote to the Minister of the Interior, he was evidently not aware that Kioloku existed. He subsequently became aware of that fact, however, as shown at least by his writing on the map (Respondent's Exhibit "10," Rec. 335) the words "no title," which words were identified by the Territorial Surveyor Walter E. Wall, as being the writing of Professor Alexander (Rec. 185). We consider it a great misfortune that we were not allowed to show that at a later date Professor Alexander did become aware of

the existence of Kioloku, and classified it as unassigned land (Petitioner's Exhibit "E" for Identification, Rec. 303 to 314), but as far as the evidence goes the letter to the Minister of the Interior merely indicates that on January 9, 1888, the professor did not have information about Kioloku, and we are unable to see how this lack of knowledge can form any basis for a presumption of a grant to Ane Keohokalole.

(g) *The attitude of past governments of these islands with respect to the land in question.*

In the year following the deed of Kalakaua and his wife to Spencer, Kalakaua became king, and reigned until 1891. The Attorney General, during his reign was appointed by him and held office at his pleasure. That may account for the fact that no attorney general, during the reign of Kalakaua, had the temerity to attack the monarch's deed.

Liliuokalani succeeded Kalakaua, and reigned until 1893. It will be remembered that she was a party to the partition deed in 1870. It may be that this was a prime factor in the negligence of the attorney general to enforce this claim. During the troublous times between the dethronement of her Majesty Liliuokalani and the cession of the islands to the United States, there were very frequent changes of administration. From 1870 to 1913, when this petition was filed, there were forty-one attorneys general in office (see Thayer's Digest, pages XV and XVI). From 1870 to annexation, there were nineteen

Ministers of the Interior. During the provisional government of the Republic of Hawaii there was one Minister of the Interior. These frequent cabinet changes afford the most potent reason for the maxim,

"Nullum tempus occurrit regi."

We respectfully submit that the "additional circumstances" relied upon by the contestant as above set forth and upon which His Honor the Trial Judge, and the Supreme Court of the Territory of Hawaii based the presumption of a grant affords no basis of any such presumption, but that on the other hand, all the facts and circumstances of this case lead irresistibly to the conclusion that there was no mahele, no award, no royal patent and no royal patent grant of Kioloku to Keohokalole or to anyone else.

THE LAW RELATING TO PRESUMPTIONS OF A GRANT.

His Honor, the Trial Judge, in deciding that the doctrine of the presumption of a grant may appropriately be involked in this case, cites among others the following (Rec. 46):

1 *Greenleaf Sec.* 17, 32, 45.

State v. Wright, 41 N.J. L. 478;

Carter v. Fishing Co., 77 Pa., 310;

Williams v. Mitchell, 112 Mo. 300, 312, 314;

Grimes v. Bastrop, 26 Tex. 310-315.

Caruth v. Gillespie, 68 So., 927, 929;
Carter v. Walker, 65 So., 120;
U. S. v. Chaves, 159 .U. S. 452, 464;
S. U. v. Chavez, 175 U.S. 509, 518;

State v. Wright, 41 N. J. L. 478.

In this case the court says:

> "Under the English cases a presumption sometimes arises to establish a claim, even against the sovereign notwithstanding the maxim, 'Nullum tempus regi,'

and many English authorities are cited in support of the doctrine. We do not deny that in England a grant may be presumed against the sovereign. We do deny that a grant can ever be presumed against the Territory. The subject will be discussed more fully hereafter.

Carter v. Tinicum Fishing Co., 77 Pa. 310-315.

This was an action filed in 1867 and involved the title to an incorporeal hereditament, to-wit, a fishery. The plaintiff claimed under an ancestor who had title to the fishery in 1748, but he was unable to connect the links in his chain of title. It was held by the court that

> "Presumption arising from great lapse of time and non-claim are *sources of evidence* which a court is bound to submit to a jury, as the foundation of title by conveyances long since lost or destroyed. Acts of ownership over incorporeal hereditaments

corresponding to the possession of a corporeal, are deemed a foundation for a presumption."

Williams v. Mitchell, 112 Mo., 311.

In this case there was involved the presumption of the execution of a deed. The probate court had ordered the deed executed, and the grantee had remained for many years in possession of the property without claim by the grantor or his successors. It was held that it will be presumed that a deed was executed in compliance with the order of the probate court. This doctrine was repudiated by the Supreme Court of the Territory in the Lewers and Cooke case, 18 Haw. 625.

Grimes v. Bastrop, 26 Texas, 310-315.

This was an action brought against the appellant for the recovery of damages incurred by the cutting and carrying away of pine timber from the town tract. The boundaries of the tract were questioned. The title of the township was defective and it relied upon the presumption of a grant. The court said:

"The doctrine of presumed grants has on several occasions been discussed in this court, and it must now be admitted as fully established on principles that cannot be controverted, that, *under proper circumstances,* a grant of land from the state may be presumed. But what facts are sufficient to

authorize the presumption, or for what length of time they must have occurred, has not yet been authoritatively determined. It may be, perhaps, that there is no general rule applicable to the subject, and that each case, as it arises, must depend upon its own peculiar circumstances. This would seem more probable if the presumption is one not of law, but as it is generally said, of facts to be drawn by the jury from the evidence. *Certainly no one who will give the subject a moment's reflection but must conclude that a very different state of facts should authorize the presumption of conveyances by a private person from those which will justify a presumption of a grant from the state.* And here again it should be much more readily presumed when all the facts are shown to exist which entitled the party to the grant and the fact sought to be presumed is a mere ministerial act to evidence a pre-existing and established right, than when the presumption is asked to be made from the mere fact of continued possession, if in many cases, it can arise from this fact alone."

The court instructed the jury that they might presume a grant from the continuous claim of the land by appellee. This was held to be error, and the case was reversed.

Caruth v. Gillespie, 68 So., 928.

This was a suit in equity by appellant to confirm his title in certain lands. The appellee relied upon a deed dated March, 1884, which had been destroyed by a fire which destroyed the courthouse and all the public records of the county in 1882. It was held under the circumstances a lost deed would be presumed.

Carter v. Walker, 65 So. 170.

In this action the plaintiff sued on account of personal injury caused by a wire which defendant had stretched across a certain alleged public highway. The presumption of a grant from the United States from adverse, exclusive and uninterrupted possession for twenty years was applied as a presumptio juris et de jure, the case following the doctrine laid down in *United States v. Chavez,* 175 U.S. 509. The court instructed the jury that the public use for the prescriptive period of the roadway in question was no evidence of public right, and hence that the roadway was not a public highway, and in accordance with this fact, instructed them to find for the defendant. It was held that this instruction was erroneous, as the case should have been referred to a jury.

United States v. Chaves, 159 U. S. 452, and
United States v. Chavez, 175 U. S. 509.

These cases were tried on appeal from the Court of

Private Land Claims, and involved the presumption of a grant from the Mexican government. This fact must be borne in mind when reading the case, for if it be borne in mind, it will be seen that the citations relied upon by the contestant in the case at bar are simply *obiter dicta.*

In *U.S. v. Chaves,* 159 U.S. 452, the claim was based upon an award granted to Juan Chaves in 1833, or sixty-two years before the case was decided. It was alleged that this grant had been lost or destroyed, at any rate it could not then be produced. Evidence was adduced in the Court of Private Land Claims from which the Supreme Court of the United States concluded that the complainant's title was derived from the Republic of Mexico, and was complete and perfect at the date when the United States acquired sovereignty in the territory of New Mexico, within which the land was situated. This evidence was as follows:

> Benito Baca had lived on the land in question and under the governor making the lost grant. He enumerated by name the colonists to whom the grant was made, and stated that there was in their possession a written grant from the governor which he had heard read and had seen; that this writing which was in the custody of Juan Chaves could not be found after the death of the latter.
>
> Jose Antonio Duran testified that he was one of the settlers under the grant; that their title was

a written title, made to them by the governor. He gave a description of the boundaries of the land and the names of some of the original settlers of 1833. He had seen and read the written title from the governor; that when Juan Chaves died, the grant was lost, and that it was currently reported that a person who had been the secretary of Chaves had carried off the documents. He further testified that when they applied for the grant, an Indian named Baca was on the land, and that the grant was made on the condition that the Indian would abandon it. Joe testified that he had heard the original grant read. The papers were in the possession and read by Juan Garcia and one Juan Chaves. He also testified that the papers had been stolen or carried away by the secretary of Chaves; that he had seen the original testimonio of the grant, and had heard it read.

A number of original deeds were likewise in evidence, dated from 1841 to 1856, showing the sales of parcels of these lands; also a petition of the people of the town of Cubero to the surveyor general of the Territory of New Mexico dated April 2, 1856, stating that they were in possession under the authority of a grant from the Mexican government about the year 1834, and that the original documents had been lost.

It was also proven by quite a number of witnesses that about 1870 a considerable portion of the archives of that territory containing documents relating to Mexican grants were lost; that these papers had been deposited in the territorial library, where some of the witnesses had seen them in 1868 and 1869; that they were sold as waste paper by the librarian Bond, and were scattered through the country. Many of these were Spanish documents, and pertained to grants of land. When the governor of the territory heard there was a complaint made by the people of this treatment of the public archives, he made efforts to get them returned, but the evidence is clear that many of them were destroyed or lost.

William M. Tipton testified that he had been employed for several years in the office of the surveyor general of the territory of New Mexico, and had charge of the Mexican archives; that the books and records in that office purporting to contain the registry of land grants made by the Spanish and Mexican governments, prior to the time the government of the United States took charge, are in a disconnected, fragmentary form, and that there are no indexes of the grants. There was evidence that the governor and the chief alcalde had delivered to the settlers a duplicate of the granting decree,

which papers had been negligently destroyed or lost.

The only evidence adduced on the part of the United States was that of Ira M. Bond, who testified that under the instructions of Governor Pile, he had sold and disposed of a lot of the old records, supposing them to be of no value; that this created quite a lot of talk in the town, and finally the governor instructed him to recover them back, and that most, but not all, of them were recovered. This witness stated that he could not read Spanish, that the documents were in that language, and that there might have been grants among them.

The Supreme Court finds as follows:

"In view of this large body of uncontradicted evidence, we think that the court below was plainly right in finding that the claimants had satisfactorily sustained the allegations of their petition. Not only was there evidence of the existence of an original grant by the government of New Mexico, and the loss of original records sufficient to justify the introduction of secondary evidence, but there is the weighty fact that for nearly sixty years the claimants and their ancestors have been in the undisputed possession and enjoyment of this tract of land. The counsel for the government, indeed, contend that the court of private land claims and

this court have no power to presume a grant upon proof of long-continued possession only; that their power is confined to confirming grants lawfully and regularly derived from Spain and Mexico.

"It is scarcely necessary for us to consider such a question because, as we have seen, there is ample evidence from which to find that these settlers were put in juridical possession under a grant from the governor of New Mexico, who, under the laws then in force, had authority to make the grant. However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case. Without going at length into the subject, it may be safely said that by the weight of authority as well as the preponderance of opinion, it is the general rule of American law, that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law (1 Greenl. Ev. 12th edition, p. 17, Ricard v. Williams, 20 U.S. 7, Wheat. 109; Coolidge v. Learned, 8 Pick. 504).

"Nothing, it is true, can be claimed by the prescription which owes its origin to, and can only be had by, matter of record; but lapse of time, accom-

panied by acts done or other circumstances, may warrant the jury in presuming a grant or title by record. Thus also, though lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, 'nullum tempus occurrit regi"; yet if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long-continued, peaceful enjoyment, accompanied by the usual acts of ownership. 1 Greenl. Ev. p. 45.

The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman law and the codes founded thereon, and was thereafter a feature of the Mexican law at the time of the cession."

It will thus be seen that the expressions of the court relied upon by the contestant in this case, were *obiter dicta* as to the general law.

In the case of *United States v. Chaves,* 175 U.S. 509, 44 Law. Ed. 255, the original grant was produced from the Spanish archives, and no question arose as to the regularity of its issuance. The claimants, however, were unable

to present direct conveyances from the original grantor or from his heirs with which they were in any way connected. The petitioner showed a continuous possession from some time prior to 1785; inferentially from 1716, and it was held that the lost deed would be presumed.

We wish to call the court's attention to another Chavez case, to wit, *Chavez v. United States,* 175 U. S. 550, 44 Law. E. 269. The petitioner in this case relied upon a grant of the department assembly or territorial deputation of New Mexico of 1831. This department assembly had no authority to make the grant. It was held that the lapse of time between the alleged grant, i.e., in 1831, to the treaty of Guadalupe Hidalgo, i.e., 1846, was not sufficient to establish his legal grant by reason of the long-continued possession of the petitioner, the court especially refusing to take into consideration the time which had elapsed between the treaty of Guadalupe Hidalgo and the decision of the case, which was in 1899, as a basis for the presumption of a grant, the court saying:

> "We do not deny the right or the duty of a court to presume its existence (i.e., the existence of a grant) in a proper case, in order to quiet a title and to give to long-continued possession the quality of a rightful possession under a legal right. We recognize and enforce such rule in the case of United States v. Chaves, decided at this term, 175 U.S. 509. We simply say in this case that the possession was

not of a duration long enough to justify any such inference. . . . The possesion subsequently existing, (i.e., since the treaty of Guadalupe Hidalgo) we cannot notice."

In the case of *Fletcher v. Fuller,* 120 U. S. 534, the Supreme Court of the United States mentions with approval the instructions given to the jury, which are in part as follows:

> "But, gentlemen, you are to look into the evidence upon this question of a grant; *and if the evidence in favor of the presumption is overcome by the evidence against such a grant, then, of course, you will not presume one. It is a question of testimony."*

That the presumption of a lost deed or grant is a rebuttable one is recognized in the following cases cited by counsel for contestant:

Carter v. Tinicum Fishing Co., 77 Pa., 310;
Reed v. Earnhart, 32 N. C. 516;
McGrath v. Norcross, 78 N. J. E. 120;
Grimes v. Bastrop, 26 Tex., 310, 315;
Williams v. Mitchell, 112 Mo., 300, 311;
Carter v. Walker, 65 So., (Ala.) 170;
Caruth v. Gillespie, 68 So., 927, 929;
Hewling v. Blake, 70 So., 247, 248;
Fletcher v. Fuller, 120 U. S. 534.

In the case of *Kapuniai v. Kekupu,* 3 Haw. 560, the court said:

> "When a lost deed, unrecorded, is set up for basis of title it is necessary that there should be presented clear proof of the execution of the deed and proof of its contents sufficient to enable the court to determine the character of the instrument."

To conclude this portion of the argument, we contend that the authorities cited by the contestant do not show that the presumption of a Land Commission Award should be entertained by the court in this case. It should be noticed in passing, that no such conditions exist in the Territory of Hawaii as exist in New Mexico, relative to the destruction of government archives. Our records are complete, and there has never been any destruction of public documents in the Hawaiian Islands, similar to that in New Mexico.

THE DOCTRINE OF THE PRESUMPTION OF A LOST GRANT IS NOT APPLICABLE AS AGAINST THE TERRITORY.

Assignment of Error No. 5.

Fifth. That said Supreme Court of the Territory of Hawaii erred in holding and deciding that the doctrine of the common-law presumption of a lost grant may be invoked in favor of the state as well as against it.

The contestant admitted during the trial of the case

that adverse possession did not run against the government and based its claim upon the presumption of a grant.

We submit, however, that the doctrine of the presumption of a grant does not apply as against the Territory, and in support of this contention we wish to call the court's special attention to the case of *Kahoomana v. The Minister of the Interior,* 3 Haw. 635. The syllabus is as follows:

> "The statute of limitations of real actions does not run against the government. Twenty years possession of land, for which no award of the Land Commission has issued, affords no presumption of a grant."

The whole case was tried on the theory that previous to 1829, Manuia and his wife Kaupena came to Hawaii and resided on the land in question (the site of the present Judiciary Building), and that her possession and that of her ancestors had been continuous, notorious, peaceful and undisturbed from 1829 to 1872, and therefore, she had acquired a title to these premises as against the government and as against third parties, evidently relying upon the presumption of a lost grant.

The court said:

> "The theory of titles by prescription is, that the holding possession of an estate openly and adversely for a certain length of time, creates an inference that there was a grant from the adverse claimant or his

ancestors or grantors, and the statute of limitations forbids the adverse claimants from setting up against this long continued possession, the fact that there was no grant.

"But *as against the government a grant cannot be presumed* or inferred from long possession, in view of the law which required claimants to land to present their claims to the Land Commission for confirmation or rejection."

This case settled the doctrine once and for all in this Territory. It has never been reversed, and has been cited with approval in many cases, including

Minister of the Interior v. Parke, Administrator, 4 Haw. 369;

Estate of Kekauluohi, 6 Haw. 172;

Thurston v. Bishop, 7 Haw. 421;

Rose v. Yoshimura, 11 Haw. 30;

Galt v. Waianuhea, 11 Haw. 652;

Atcherley v. Lewers and Cooke, 18 Haw. 625;

Territory v. Puahi, 18 Haw. 649.

Whatever the law may be elsewhere, in the Territory of Hawaii, no presumption of a lost grant can be entertained against the government.

Assignment of Error Nos. 1, 2, 3, *and* 4.

First. That the said Supreme Court of the Territory of Hawaii erred in rendering, entering and filing its decision

affirming the decree of the Land Court of the Territory of Hawaii, which said decision of said Supreme Court of the Territory of Hawaii was filed in said cause on the 15th day of March, 1920, and which said decree of the said Land Court was entered and filed on the 4th day of February, 1919.

Second. The said Supreme Court of the Territory of Hawaii erred in rendering and filing judgment affirming the decree of the Land Court of the Territory of Hawaii, which said judgment of said Supreme Court of the Territory of Hawaii was filed in said cause on the 18th day of February, 1919.

Third. The Supreme Court of the Territory of Hawaii erred in not reversing the decree of said Land Court of the Territory of Hawaii, which said decree was enterd and filed in said Land Court on the 4th day of February, 1919.

Fourth. That the said Supreme Court of the Territory of Hawaii erred in not holding and in not entering judgment in said cause in favor of said appellant and against the Hutchinson Sugar Plantation Company, Limited.

In case the Court shall find that under the law and the evidence in this case, no award, patent or grant of Kioloku has been issued by the government, and that none will be presumed, it must follow that the rulings of the Supreme Court of the Territory referred to in these assignments, should be reversed.

Dated Honolulu, T.H., December 24, 1920.

Respectfully submitted,

HARRY IRWIN,
Attorney General of the Territory of Hawaii.

J. LIGHTFOOT,
Deputy Attorney General.